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ABSTRACT

This publication is part of a three-volume series of manuals designed to serve both as instructional guides and as ready references to some of the more complex problems of public school collective bargaining. The series is intended for use primarily by school board members, educational administrators, and other individuals interested in collective bargaining in public schools. This particular manual focuses on arbitration as a means of solving grievances arising out of the employer-employee relationship in public schools. Most of the manual consists of part 1, a narrative section that discusses various aspects of the arbitration process. Part 2 presents five simulation training exercises designed for either group or individual use. At the end of each exercise, there are several discussion questions and a proposed solution to the problem. Part 3 presents a bibliography of various publications related to arbitration, including a number of relevant bibliographies, and lists a number of service organizations involved in the area of arbitration. (JG)

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TRAINING RESOURCE MANUAL ON ARBITRATION IN THE PUBLIC SCHOOLS

A Project Financed by the U.S. Office of Education under Public Law 89-10 ESEA Title V, Section 505

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HOW TO USE THIS MANUAL

This manual is intended to be used by school boards, school administrators, and others who use or are interested in the grievance procedure and arbitration as a method of solving grievances arising out of the employer-employee relationship in the public schools. Administrators in public schools increasingly find that an awareness of the collective bargaining process and collective bargaining contract administration is necessary for all persons on all levels in the public schools. Although the last few years have seen a proliferation of workshops and seminars on aspects of public sector collective bargaining, there have been few attempts to look at the proper role of the various components in the bargaining relationship in a comprehensive fashion.

The first section of the manual is a narrative covering all aspects of the arbitration process in a ready reference matter. The table of contents is a complete description of the arbitration process. The text is intended as a starting point for thinking and further reading. Those who are interested in studying the problem in depth are referred to the third section of the manual which is a comprehensive bibliography.

The second section consists of work problems designed for group or individual use. The most desirable method of study involves a group and an experienced discussion leader. At the end of each problem there are discussion questions and a proposed possible solution. Each question is indexed to the posed possible solution. Each question is indexed to the textual outline or text material as an aid to self-study.

As the problems are examined it will become apparent that relevant information that would be useful in formulating a solution is lacking--a situation which is all too common in actuality. An awareness of the importance of the proper development of the pertinent facts will itself be a major step toward more effective grievance handling. Proposed solutions for the problems prepared by Professor David R. Bloodsworth are guides only. They are not the only solutions or necessarily the most appropriate. Nevertheless, they can be used as measuring sticks.

The materials in this manual, including the work problems, were either developed for or tested at a conference in Newport, Rhode Island, August 11-15, 1975, as part of the continuing study of "Collective Bargaining and the Role of State Education Agencies." The study has been financed by a grant from the United States Office of Education as a 505 Project through the Rhode Island Department of Education and involving representatives of New Jersey, Rhode Island, New Hampshire, Hawaii, Pennsylvania, and Wisconsin.

An examination of the Table of Contents will disclose that it is a complete outline of the process of arbitration. Used in conjunction with the Bibiliography, which is Part III of the manual, it is a ready reference guide for the individual who is seeking to find out about arbitration at a beginner's level or is looking for a starting place for more intensive reading. The Table of Contents is also designed to be used for training workshops. Each heading in Roman numerals is a suggested usable module for a workshop leader. A discussion leader who is also experienced as an arbitrator or a practitioner will find that any combination of modules as required for a workshop will supply a complete outline and beginning text which can be the springboard for discussion among participants.

In trying out the material, the four-day residential conference was designed. The first two and a half days were spent in structured groups of some 30 participants with a skilled arbitrator as discussion leader. For the workshop, the problems in Part II of the manual were used and the groups were divided into three groups of 10 each with a skilled arbitrator as discussion leader. It has been found that small groups are desirable for role playing purposes but the work problems are also usable in groups of 20 or 25 with a skilled discussion leader. The solutions at the end of each work problem are not the only possible solutions, they are simply solutions that seemed appropriate from a school viewpoint with the assumption of some additional facts. By assuming other facts, completely different solutions may be reached. In the residential program where the material was tested, the evenings were devoted to unstructured informal group discussions.

The following training outline is based upon the material tested in Newport and is designed for a three-day session. The time blocks are for the formal program. If a residential training program is offered, the evenings might usefully be spent in unstructured discussion groups going over the material covered during the day. The discussion leader should be a skilled arbitrator or a skilled professional practitioner in arbitration. The first-day session covers the process of arbitration under the rubric of preparation. The second-day session covers the substance of arbitration under the rubric of presentation. The third-day session is devoted to workshop. There are five work problems. Each problem is presented in incident fashion; contract provisions are identified and the correspondence between the teachers organization and the school board is reproduced. It will immediately become apparent that other facts ought to be developed. If the workshop discovers that the grievance and answer to the grievance by itself does not develop all the facts to solve the problem, that is an important discovery, although, unfortunately, it happens more often than it is desirable. After each problem there is a suggested solution. It is not the recommended solution nor the only solution, it is simply

a solution that can be used to check against such solutions as the workshop participants determine is appropriate.

The solution is based upon the facts as given plus assumption of facts. If other assumptions are made, other solutions will present themselves. The work problems will also lend themselves to role playing in arbitration provided there are sufficient resources to divide the people into smaller groups. Before arbitration role playing is attempted, unless the discussion leader is skilled in the process, it might be advisable to secure a training film especially if the participants have never had any experience in arbitration. Training films may be borrowed or rented at low cost from the American Arbitration Association. The regional offices are listed on page 45 of the manual. For those who do not have a university convenient nearby with a Labor Relations or Industrial Relations Department or a library which could assist in locating films, there are, on pages 156 and 157 of the manual, the names and addresses of various places, such as the U. S. Civil Service Commission, or the U. S. Department of Labor, and various private organizations which could provide information about training films.

THE PRACTICE AND PROCEDURE OF ARBITRATION

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   a. Procedure (state agencies, federal agencies, private agencies)
   b. Standards for selection: who are the arbitrators
   c. What parties expect from arbitrators

   Readings: Pages 21-26

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   a. Jurisdiction of arbitrators

   Readings: Pages 7-20 and 27

3. Scheduling Hearings

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      Readings: Pages 50-52

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16. Summation and Closing Arguments and Their Use
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Clark School - Discussion questions - pages 118-119

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INTRODUCTION

References in this manual to Begin mean Professor James P. Begin, Research Professor, Institute of Management and Labor Relations, Rutgers, the State University of New Jersey. References to Benewitz are to Professor Maurice C. Benewitz, formerly of Baruch College, C.U.N.Y. Professors Begin and Benewitz made oral presentations at the Newport conference and their statements in this Manual are paraphrases. References to Zack are to Arnold Zack, Esq. Mr. Zack, in addition to his oral presentation at Newport, referred to his publication in the field of arbitration. We have drawn heavily on quotations from Understanding Grievance Arbitration in the Public Sector written by him and published by the U. S. Department of Labor, Labor Management Services Administration, Office of Labor-Management Relations Services. The publication is available from the Superintendent of Documents, Washington, DC 20402, Doc. #029-000-00227, Price $1.00. References to Zack in this manual are to that publication.

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I. ARBITRATION PROCESS

A. Purpose of the Grievance Procedure

Once a collective bargaining agreement is signed, the parties have a document which, in essence, outlines the respective rights and responsibilities of each party in its relationship to the other. Such an agreement, however, cannot foresee all the possible disputes which might arise. The purpose of the grievance procedure is to provide a mechanism by which such disputes can be settled in an orderly and mutually satisfactory manner.

The sorts of questions that might arise during the life of a collective agreement include those which concern the meaning of a particular clause and the manner in which it is to be applied, if at all.

Zack discusses the employment contract as it is contrasted with other common contractual relationships and introduces the notion of neutral resolution of disputes:

> The employment contract is not a 'one shot' deal. It would be virtually impossible to move the work force to a different location or for the employer to hire an entirely new work force. It is equally impractical as well as expensive and time consuming to run to the courts for relief every time one party believes its rights under the collective bargaining agreement have been infringed upon.
>
> The employees might exert economic pressure by withholding their services (striking) until the employer gives in on a complaint, or the employer might 'lock out' his striking employees until they are willing to return to work on his terms. Indeed, at one time such economic confrontation was the rule. More recently the parties have come to accept that they are, in a sense, 'married' to each other. The parties have opted for the grievance procedure culminating in arbitration as the quid pro quo for the jungle warfare of the strike and the lockout.
>
> What is required therefore, is a sort of 'marriage counseling' provided by an individual who recognizes and is committed to preserving the nature of the parties' ongoing relationship and who is well versed in law and the practice of labor relations. (Zack, p. 1.)

(I. ARBITRATION PROCESS)

B. History and Development of Arbitration

In a paper delivered by James Begin at a Project 505 conference on arbitration, grievance arbitration was defined as an "impartial system of employment jurisprudence which derives from the collective bargaining process." Begin noted that the process is the product of the parties' mutual agreement introduced during World War I as a device to avoid the disruptive effects of labor strife. It was under the War Labor Board procedures that grievance arbitration began to be accepted as the quid pro quo for the strike. Elkouri and Elkouri in 'How Arbitration Works' point out that while the use of arbitration in labor disputes is relatively new, impartial interpretation of contracts, legislation, constitutions, etc., is a device dating back to King Solomon.

Begin offered figures on the widespread use of grievance arbitration in the private sector: by 1966, 94 percent of contracts provided for arbitration. Provision for arbitration in public sector contracts is also growing: nearly 84 percent of contracts have negotiated grievance procedures in which some form of neutral intervention is the final step. In N.J., by the 1973-74 school year, 77 percent of education contracts provided for advisory (37 percent) or binding (40 percent) arbitration. In 1974, the American Arbitration Association caseload was 10,064 cases, of which 6,966 were in the private sector and 3,098 were in the public sector. A dramatic increase of cases in the public sector is expected to follow from the continuing rapid growth of collective bargaining in public employment.

(I. ARBITRATION PROCESS)

1. In commenting on the preferability of arbitration to court enforcement of labor contracts, most authors note that the former is less costly, and more expeditious. Other advantages accrue from the expertise of the arbitrator and the relatively nonlegalistic character of the process as it has evolved. The strongest advantage of arbitration, however, is that the process is one that the parties to the agreement create and one over which they exercise control.

   Begin concluded with comments on the relationship of arbitration to the collective bargaining process:

   Effective appeals procedures are basic to stabilized relations between the parties. If employee discontent is not expressed rationally through the grievance process, then conflict will spill over into subsequent contract negotiations. For this reason, one famous arbitrator 'urged that every grievance should be received, hear, and considered seriously and sympathetically and that, to the extent possible, every grievance should be made the occasion for additional education of the parties and for a little more smoothing out of the wrinkles in their relationship.' (Elkouri and Elkouri, p. 114) He was arguing that the grievance process should be open to every complaint, although the scope of the arbitration process might well be restrained. Likewise, an extremely adversary bargaining relationship will spill over into the grievance and arbitration processes.

2. Zack discusses the disadvantages and unique aspects of arbitration: (Zack, p. 3-4.)

   Although arbitration has become the most widely used forum for labor-management contractual dispute settlement, it still possesses a number of limitations. Many of these are noted below in our consideration of the details of the procedure, but some should be pointed out at the outset.

   First, despite its informality and speed even arbitration can become costly. The concept of both parties sharing equally in the cost of the neutral, including his fees and expenses, while no doubt equitable, is a burden not faced in appeal to the courts or to the applicable administrative agencies. Smaller units of government and small employee organizations find this burden even greater and even perhaps

a deterrent to having their 'day in court.' The cost problem may be exacerbated by the scarcity of experienced neutrals in many of the less indistrialized areas of the country. The importation of arbitrators from those areas of the country having a concentration of industry and commerce will intensify the cost problem.

Second, arbitration can be abused by the unscrupulous use of power. When used as a tool of harassment by either a wealthy employer or a powerful employee organization, it can impose intolerable pressure on the other side to capitulate on grievances rather than be 'arbitrated to death' in terms of cost or time expenditures.

Third, there has been a tendency toward excessive legalism to the detriment of the informality and speed of private sector arbitration; this may be an even greater handicap in the public sector where the pre-collective bargaining atmosphere is geared toward heavy reliance on procedure and may lead to routine use of lawyers, transcripts and post-hearing briefs. This inevitably means a slower, less effective and more expensive procedure of dispute resolution.

Fourth, arbitration is a private proceeding with little opportunity for public employers or employees to exercise political leverage. Therefore, it lacks the prospect of effective use of political pressures which may, on occasion, bring more favorable rulings in administrative agencies or on appeal to the local legislature or courts. Arbitration tends to treat the strong and the weak alike.

3. Unique aspects of arbitration

In addition to this list of advantages and disadvantages, it should be pointed out that arbitration is unique in its impact for other conceptual reasons. It provides an opportunity for balancing equities between the parties, for solving vexing problems between the parties which were not foreseen or dealt with in contract negotiations. In many cases it permits the grievants as well as the parties the cathartic value of having their "day in court" and the opportunity to "save face."

It also constitutes an acquiescence by the individual to be bound by an award because it is binding on his employee organization. Although there are continual legal questions which arise over the extent to which the grievant surrenders his right to use other forums such as the National Labor Relations Board, the Equal Employment Opportunities Commission, or similar state agencies, or the courts, it is generally accepted that the individual is bound by the workings of the procedure agreed to by the parties to the collective bargaining agreement.

Finally, the procedure is unique in its precedent setting characteristics. Arbitration decisions are important not only for the resolution of the dispute at hand, but as a guide for the parties to the future interpretation and application of their contract, and to arbitrators of future disputes arising from the same or successor contracts. (Zack, p.3)

(I. ARBITRATION PROCESS)

4. Advisory or binding awards

A final element of the arbitrator's jurisdiction which must must be agreed upon by the parties in their negotiations is whether the arbitrator's award is to be advisory or binding. Strictly speaking advisory arbitration is a misnomer, since the term arbitration presumes an agreement to be bound by the neutral's determination. In the private sector, binding arbitration is nearly universal. In the public sector the arbitration system has often commenced as advisory due to actual or assumed statutory prohibitions on binding arbitration and to the reluctance of many formerly omnipotent employers to share their decision-making authority. Increasingly, however, new contracts contain provisions for binding arbitration. The arbitrator's authority focuses on interpretation and application of the parties' agreement, rather than on regulations, by-laws or statutes which are beyond his or even the parties' control. In practice even if the arbitration is advisory, it behooves the employer to accept the arbitrator's recommendation if it seeks to avoid acceptance of binding arbitration. Failure to accept the advisory award will certainly strengthen the voice and perhaps the cause of the organization in its demand for binding arbitration in the next negotiations.

As for the arbitrator, whether the award is advisory or binding makes little difference in his handling of the case. Presumably, a written award detailing his reasoning and justifying his decision must be rendered in either case. The only difference in approach might be the increased interest of the arbitrator in attempting to mediate a dispute which in its ultimate resolution is dependent on a mutually acceptable solution. The arbitrator might feel that this acceptability would be more readily attainable through mediation than by direct negotiation between the parties after the issuance of an award which might have frozen the victor's position to deter direct settlement. (Zack p.10)

II. LEGAL STATUS OF ARBITRATION

A. Overview

The most active governmental role in the field of private sector arbitration has been played by the judiciary. There has been a considerable change in the attitude of the courts from rejection of arbitration as an improper means of dispute settlement and an illegal invasion of the exclusive jurisdiction of the courts in dispute settlement. The growth of arbitration itself, as well as the passage of "modern" arbitration agreements valid and enforceable, has tended to bring a more tolerant attitude on the part of the courts toward private sector arbitration. The original jealousy of the courts has been replaced by a recognition of the preferability of a mutually developed and self-policing voluntary procedure for dispute settlement. The courts have also come to accept the desirability of the parties agreeing on their own choice of decision-maker.

The culmination of the movement toward respect for arbitration is demonstrated by a series of three U.S. Supreme Court decisions, referred to as the "Steelworkers' Trilogy": USWA v. American Manufacturing Company, 363 US 564; USWA v. Warrior and Gulf Navigation Company, 363 US 574; and USWA v. Enterprise Wheel and Car Corporation, 363 US 593. The courts' new role is limited to intervention in situations where they are called upon to stay arbitration, to enforce the parties agreement to arbitrate, or to enforce an award resulting from an arbitration. Such problems arise infrequently and generally result in enforcement of the awards unless there is proof of fraud, misconduct, gross mistake, substantial breach of common law rule, or capricious conduct on the part of the arbitrator. (Zack, p. 2-3)

Although arbitration in the private sector has been given a seal of approval by the government, similar endorsement has not been forthcoming for arbitration in the public sector. Here, the jurisdictional autonomy and claim of inherent authority on the part of local, state and federal governments has resulted in variations in the extent to which binding grievance arbitration has been encouraged, accepted or even tolerated. Some jurisdictions continue to adhere to the view which traditionally prevailed before unionization in the public sector that the employer, as a structure of government, is prohibited from delegating to any outsider the right to make a determination which is binding on it. This position is premised on the theory that arbitration constitutes an improper usurpation of governmental authority which is more properly vested in and reserved to the executive and legislative branches of the government. This school of thought has been eroding as more and more state and local courts, corporate counsel, and Attorneys General opinions are fuling that the delegation of such authority is permitted as a voluntary ceding of managerial prerogatives. The arbitrator is seen

merely as interpreting or applying those rights to which the employer has originally agreed in the collective bargaining agreement. Such delegation is therefore viewed as within the authority of the executive, and the resulting arbitration awards are, accordingly, deemed enforceable. In some jurisdictions the problem has been resolved by specific legislative authorization of arbitration for the resolution of questions of contract interpretation and application. In the federal sector, Executive Order 11491 has granted authority for the inclusion of grievance arbitration in collective bargaining agreements between federal agencies and organizations representing their employees.

It is apparent that the role of government in the American experience with grievance arbitration has differed in the private and public sectors. In the private sector the role has been to respect it as a process and forum to be developed by the parties themselves in situations where they believe it will assist in administering and enforcing their agreement and in restricting the incidence and escalation of conflict during its life. The role of government has been restricted largely to one of recognizing and respecting the privacy and voluntary nature of such agreements. It has refrained from forcing the parties to adopt any specific machinery, recognizing that arbitration's effectiveness comes from the voluntary nature of its adoption by the parties themselves. The success of such voluntary procedures in the private sector is attested to by the fact that some 95% of the estimated 130,000 collective bargaining agreements currently in effect provide for grievance arbitration. It is underscored by the willingness of the judiciary to endorse almost universally the awards emanating from such procedures.

Whether similar, widespread acceptance and endorsement of the procedure will evolve in the public sector remains to be seen. The evidence to date is that acceptance of the concept of arbitration and the growth of its use will continue. But in the public sector there has been no clear consolidation of issues. These are now in the process of change. (Zack, p.2-3)

B. The following articles on "Types of Law" through "Grounds for Modifying or Correcting Award" are reprinted by permission from Anatomy of a Labor Arbitration, by Sam Kagel, Copyright c 1961 by The Bureau of National Affairs, Inc., Washington, D.C. 20037.

In the United States, there are two types of law:

1. Written law (Statutory law): The Constitution of the United States and the Constitutions of all the States form the fundamental law of this country. All other law must be within the general policies established by these constitutions.

Enactments, or laws, passed by Congress or the state legis-

(II. LEGAL STATUS OF ARBITRATION)

latures are called statutes. Acts of cities are called ordinances.

All of these, the Constitutions, Federal and State statutes, and ordinances comprise our written law.

2. Unwritten law (Common law): This is law developed by courts. When the courts have no written law on which to base its decision in a particular controversy, it decides the case on the basis of custom and general principles of right and wrong. These decisions create precedents or rules, which are applied to similar future controversies. The body of law created in this fashion is spoken of as the common law.

Much of the American common law was derived from precedents established by English courts before the Revolution. American courts have continued to modify the common law through their decisions.

On any specific subject both bodies of law, common law and statutory law, must be considered. If there is no written law on the subject, then common law, as applied by the courts of the jurisdiction, controls the situation.

If there is a statute on the subject, then the statute and its court interpretations control the situation to the extent the common law has been changed. However, the statute may not cover all aspects of the subject, or it may apply only in certain specified circumstances. Because of this, it is often necessary to consult both common and statutory law. Law is a volatile field. The law on a subject may be changed by the act of a legislature or by a court decision. This is happening every minute. The law on a particular subject must be checked for the latest laws and decisions on that subject. The summary of legal aspects of arbitration set forth below is a general summary only and is not intended to be an exhaustive analysis of the law of arbitration in any jurisdiction. And even its general validity is limited to the law as it was at the end of 1959. But it is designed to give some indication of matters in this field covered by law.

I. Enforceability of Agreements to Arbitrate

a) Under Common Law (non-statutory)

Under common law, either party may refuse to abide by his agreement to arbitrate at any time before the rendition of the award. Even after the hearing has taken place and all the evidence has been submitted to the arbitrator, a party may refuse to be bound by the award if he does so before the award is issued.

Nor will the courts, without legislation providing for it, allow a party to use legal action to force the other party to comply with the terms of an arbitration agreement. In other words, under common law it is not possible to obtain specific performance of agreements to submit disputes to arbitration.[2]

b) Under Federal Statutory Law

1. United States Arbitration Act

The United States Arbitration Act was passed in 1925 and codified in 1947.[3] Under this act, agreements to arbitrate were specifically enforceable.[4] However, the United States Arbitration Act specifically excludes "contracts of employment." Federal courts have disagreed as to whether this exclusionary phrase should be interpreted to include labor-management agreements to arbitrate, thus excluding such agreements from the coverage of the act.[5] This question has not been resolved by the Supreme Court of the United States, but with the interpretation of Section 301 of the Taft-Hartley Act[6] there is no longer any real need to determine whether the United States Arbitration Act covers labor-management agreements to arbitrate, unless that act is amended to provide such coverage.

2. Section 301 of the Labor-Management Relations Act of 1947

Section 301 of the Labor-Management Relations Act gives Federal District Courts jurisdiction over suits for violation of collective bargaining agreements in industries affecting interstate commerce. In 1957, the Supreme Court, in the Lincoln Mills decision ruled that this section gives the Federal courts power to order specific performance of employer-union agreements to arbitrate disputes. The Supreme Court in that decision declared: "It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rules, against enforcement of executory agreements to arbitrate."

In the Lincoln Mills decision, the Supreme Court directed the Federal courts to fashion a body of Federal substantive law to apply to these cases brought under Section 301 of the Act. In cases brought after the Lincoln Mills decision, the Federal courts have begun building this body of substantive law. Holdings have made it clear that the arbitration

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[1] Bacon Abridgement, Arb. B., Comyns Dig., Arb. D., 5; Vinyor's Case 8 Code, 82.

[2] Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924), 44 S. Ct. 274, 68 L. Ed. 582.

award as well as the agreement to arbitrate may be enforced under Section 301;[8] that the award may be returned to the arbitrator for completion if it lacks certain figures which make it impossible to enforce;[9] that the question of procedural arbitrability is a matter for the court to decide, unless the agreement specifically states otherwise.[10]

The Supreme Court of the United States has rendered three major decisions on certain aspects of arbitration law to be applied by the Federal Courts in Sec. 301 suits. These cases are important, not only for the points of law determined in them, but also for the Supreme Court's statements of general policy and attitude toward labor-management arbitration. Because of their importance to this field the cases are reproduced in Appendix D.

c. Under State Statutory Law

Some states have no arbitration statutes of any type. In these states the common law doctrine discussed above governs enforceability.

Five states have statutes which expressly exclude collective bargaining agreements from the coverage of the arbitration statute.[11] And seven states have statutes which expressly extend coverage to such agreements.[12]

Other states have general arbitration statutes which do not expressly cover labor-management agreements to arbitrate. In some of these states, including California, the courts have construed the general statute in such a way as to make it applicable to agreements by labor and management to arbitrate disputes.[13] Other states have not as yet applied their general statutes to labor-management agreements.[14]

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[3] 9 U.S.C. Sections 1-14

[4] Id. Section 4.

[5] Held: collective bargaining agreements are within U.S. Arbitration Act, Lewitts & Sons v. United Furniture Workers (1951), 95 F. Suppl. 851 Contra: Int'l. etc. Furniture Workers v. Colonial Hardwood Flooring Co. (1948), 168 F. 2d, 876.

[6] 61 Stat. 156, 29 U.S.C. Sec. 185

[7] Textile Workers Union of America v. Lincoln Mills of Alabama (1957) 77 Sup. Ct. 912.

[8] Textile Workers v. Cone Mills Corp., U. S. Ct. of Appeals, 4th Circuit (1959), 268 F. 2d 920

[9] Enterprise Wheel & Car Corp. v. Steelworkers, U.S. Ct. of Appeals, 4th Circuit (1959), 269 F. 2d 327.

[10] Brass Workers Union v. American Brass Co., U. S. Dist. Ct. East Dist. Wis., 1959.

(II. LEGAL STATUS OF ARBITRATION)

II. Judicial Review of Arbitration

Although arbitration tribunals are not a part of the judicial system, there are several ways in which the arbitration agreement, procedure, or award becomes subject to judicial review. This occurs whenever there is an appeal to the courts for some action in connection with the arbitration. This step to the courts may occur before the arbitration hearing or after the award has been rendered. It may take either of the following forms:

A. A Suit for Specific Performance of an Agreement to Arbitrate. We have commented above on the common law and statutory rules on this type of suit. Legislation permits a party to an arbitration agreement to obtain specific performance. Before granting it, the court must determine whether, in fact, the parties agreed to arbitrate the dispute. This type of determination by the court has given rise to a question concerning whether the court or the arbitrator determines the issue of arbitrability when it is clear that an agreement to arbitrate exists but there is an issue as to whether or not a particular dispute is within the scope of that agreement. It is a difficult question because the issue itself may be easily confused with the merits of the case. Theoretically, it would seem logical to limit the court's determination of this issue to the existence of the agreement between the parties. If the merits of the case must be decided to determine whether the dispute is arbitrable under the agreement, or if the entire collective bargaining agreement must be interpreted and applied, these would seem to be the functions of the arbitrator. Regardless of the theory, the courts have not been uniform in their treatment of this question. If a question of this sort is raised, the parties must carefully research the law in their jurisdiction.[15]

B. A Suit on the Arbitration Award. This suit has one of the following purposes.

1. to enforce the award
2. to vacate the award
3. to modify the award

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[11]Arizona, Michigan, New Hampshire, Oregon, Wisconsin.

[12]Maine, Minnesota, New York, New Jersey, Ohio, Rhode Island, and Wyoming.

[13]Levy v. Superior Court, 1940, 104 Pac. 2770, Greyhound Corp. v. Motor Coach Employees, Wash. Sup. Ct., 1954, 22 LA 55.

[14] e.g., Pennsylvania.

[15]For an excellent discussion of this problem, see Summers, "Judicial Review of Labor Arbitration," 2 Buffalo Law Review 1 (1952); also Plaut, "Arbitrability Under the Standard Labor Arbitration Clause" (1959), 14

(II. LEGAL STATUS OF ARBITRATION)

Regardless of the particular reason for the suit on the award, the same general rules apply concerning the degree to which the court can review the arbitration case in order to determine the validity of the award.

a) Enforcing the award

Although the agreement to arbitrate was not enforceable at the common law, the arbitration award could be enforced.[16] After the award was issued the contract was considered an executed contract and the courts would treat the award as final and binding on the parties in accordance with their agreement to arbitrate the dispute.

Ordinarily, the courts will enforce the arbitration award even though the arbitrator has made a mistake as to law or fact. The arbitrator, as a general rule, is the final judge of both law and fact on the issues submitted to him. In a leading case on this point the court stated:

"The award of an arbitrator cannot be set aside for mere errors of judgment, either as to the law or as to the facts. If he keeps within his jurisdiction, and is not guilty of fraud, corruption, or other misconduct affecting his award, it is unassailable, operates as a final and conclusive judgment, and, however disappointing it may be, the parties must abide by it."[17]

It has also been held that an award will not be set aside

-- on an alleged insufficiency of evidence because this matter is not reviewable by the court.[18]

-- for failure of the arbitrator to follow the legal rules of evidence where the parties had not intended to be bound by such rules.[19]

In many state jurisdictions, where the enforcement of the arbitration award is covered by an arbitration statute, the procedure for enforcement includes formal steps that must be taken and time limits within which these steps are to be taken in order to enforce the award. Therefore, even though an award is enforceable under both common and statutory law, it is essential to investigate the statutes

Arb. J. 51. The following are examples of the court's treatment of this problem.

Internat'l Assoc. of Machinists v. Cutler Hammer (1947), Inc. 1297 N.Y. 519, 74 N.E. 2nd 464;

U.A.W. v. Benton Harbor Malleable Industries (1957), 242, F. 2d 536;

American Fed. of Grain Millers, etc., v. Allied Mills (1949), 196 Misc. 517, 91 NYS 2d 732;

Monument Mills, Inc. v. Textile Workers, U.S. Dist. Ct. Mass. (1957), 152 Red. Suppl. 429.

[16]For an early American case in which the nature of common law arbitration awards was discu-sed, see Brazil v. Isham (1854), 12 N.Y. 9.

concerning procedural matters relating to enforcement.

b) Grounds for vacating arbitration awards

Both statute and case law agree that an award, otherwise binding, may be set aside where it can be shown that the arbitrators were guilty of misconduct, where material mistake appears on the fact of the award, or where evidence of fraud is present.[20]

Misconduct of the arbitrator may be shown by providing that the arbitrator is interested in the outcome of the dispute,[21] evidence of partiality, such as visiting the home of one of the parties during the dispute[22] ex parte consultations with one party to the proceedings[23] or an unauthorized personal investigation by the arbitrator.[24]

c) Grounds for modifying or correcting award

Many arbitration statutes give the court a right, upon certain grounds, to modify or correct the arbitration award and confirm it as corrected. Because these grounds vary from state to state, the law on this point of the particular state should be determined if the parties contemplate requesting such a modification of the award.

Typical grounds for this type of court action may be found in the proposed Uniform Arbitration Act which provides that the court may correct or modify if it finds any of the following:

1. an evident miscalculation of figures or an evident mistake in the description of any person, thing or property, referred to in the award;

2. that the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

3. that the award is imperfect in a matter of form not affecting the merits of the controversy.[25]

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[17]Where a claim in the Submission to Arbitration can only be applied from the facts alleged, the Arbitrator's failure to consider it is only an error of judgment established in the absence of fraud or gross misconduct and is not subject to judicial review, Supp. v. Barenfeld (1949), 34 C 2d 515, 212 P 2d 233.

[18]Pacific Vegetable Oil Corp. v. C.S.T. Ltd. (1946), 29 C 2d 228, 174 P 2d 441.

[19]Griffith Co. v. San Diego County College for Women (1955), 45 C 2d 501, 289 P 2d 476.

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> These are only a few of the legal aspects of arbitration. It cannot be overemphasized that any problem of arbitration law requires careful research concerning the law of the particular jurisdiction as it stands at the moment of the dispute. And the philosophy or history behind the particular legal doctrine should also be known. It is possible that a thorough understanding of that could lead to a persuasive argument to change existing arbitration law on a particular point. (Kagel, pp. 139 - 145)

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[20]"When May an Arbitrator's Award Be Vacated?," DePaul Law Review 236 (1958)

[21]In re Miller (1940), 260 App. Div. 444, 23 N.Y.S. 2d 120; Schwartzman v. London & Lancashire Fire Ins. Co. (1927), 318 Mo. 1089, 2 S.W. 2d 593.

[22]Robinson v. Shanks (1889), 118 Ind. 125, 20 N.E. 713

[23]Spitzer Electric Co. v. Girardi Construction Corp. (1955),147 N.Y.SS. 2d 40, 286 App. Div. 40. But, compare California holdings contrary to this: Supp. v. Barenfeld (1949), 34 Cal. 2d 515, 212 P 2d 233; Griffith Co. v. San Diego County College for Women, 45 C 2d 501, 289 P 2d 476.

[24]Brotherton, Inc. v. Kraelshumer (1951) , 8 N.J. 66, 83 A. 2d 707.

[25]Proposed Uniform Arbitration Act, Section 13.

III. SELECTING ARBITRATORS

A. General

The arbitration process is based upon the use of a mutually acceptable neutral individual. There are a number of methods of finding or selecting such a person. It is possible for the parties to designate one or more permanent arbitrators (or umpires) in their agreement. The agreement may specify the manner in which an arbitrator is to be selected, for example through an appointing agency such as the American Arbitration Association, the Federal Mediation and Conciliation Service, or any of the state agencies.

Zack discusses the advantages and disadvantages of permanent arbitrators, ad hoc arbitrators, and designating agencies.

1. Permanent arbitrators

Under the permanent umpire system the parties in their negotiations agree upon a permanent neutral whose name is written into the agreement. He becomes the parties' automatic choice for arbitrator in all cases reaching the arbitration step for the life of the agreement or until he is relieved of his responsibilities. The designee may be employed on a full-time basis, devoting his time exclusively to these two parties if their case load warrants. He may, as is more often the case, be employed on a part-time basis, subject to call when needed. The same arrangement can be made utilizing a number of permanent umpires on a rotating basis. Any individual on this permanent panel who is called upon to arbitrate for the parties serves the same function as the single permanent umpire.

The method of his removal is also a matter of negotiations. The parties may agree that he is to be employed for the full term of the agreement, that he may be removed at the request of one party, or that he may be removed only if both parties agree.

Among the benefits of the permanent umpire method is the elimination of the time-consuming and often hostile discussions as to which arbitrator should be selected for a particular case. Since most arbitrators usually give priority to cases arising out of their umpireships, it is also possible to get earlier scheduling of hearing dates.

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A rotating panel can be particularly helpful in reducing delays if it is so structured as to allow the bypassing of the next arbitrator in instances where his schedule precludes a prompt hearing. Use of a permanent umpire also assists the parties by permitting them to work with a person who is familiar with them and their problems and whose style of conducting a hearing and seeking out necessary information is known to them. A single umpire also provides a greater continuity in decision-rendering. To know or anticipate an arbitrator's views on a particular subject matter may forestall the filing of weaker grievances. With an umpire, decision-rendering tends to be more consistent and to provide the parties with one neutral's attitudes. This provides a measure of guidance in handling later disputes throughout the grievance procedure. This arrangement also assures that the arbitrator has the necessary familiarity with the enterprise as well as understanding of the details of its operations. Perhaps most importantly, the umpire, unlike the ad hoc arbitrator, develops a comprehensive and detailed understanding of the parties' relationship from his repeated role in solving their problems. This, in turn, shortens the length of time spent in hearings on background information. The umpireship arrangement is of particular value in a multi-location operation. There the use of the same arbitrator in a number of different locations helps to insure uniformity of personnel practices and contract interpretations among the diverse operations.

But the umpireship also has its drawbacks. For the parties, the use of a single neutral binds them to the thinking process of one man. This reduces or eliminates the opportunity to seek out other arbitrators with a different philosophy or viewpoint in dealing with related issues. There is much less likelihood of an arbitrator reversing himself than there is that another arbitrator will decide like facts in a different way. The umpireship system also tends to foster the forwarding of more cases to arbitration than might otherwise occur, particularly if the arbitrator is on a retainer fee arrangement where the cost per hearing might be less than if an ad hoc arbitrator were used.

For the neutral, too, the umpireship has its drawbacks. If the umpire is too readily available he may come to feel over-used. Although the assurance of handling all the parties' work is gratifying, particularly if a retainer fee is negotiated, there may be an uncomfortable feeling that the parties are pressuring him or that they are upset if they each don't win their 'fair share' of the arbitration cases. This is obvious in the umpireship arrangement because of the repeated contact with the spokesmen for the parties and the arbitrator's exposure to expressions of dissatisfaction with his performance in a particular case. This is not noticed in ad hoc arbitrations where the losing party may simply refrain from using the arbitrator again; the arbitrator's ignorance is his bliss.

2. Ad hoc arbitrators

Although the permanent umpireship arrangement has been employed in a number of situations in the public sector, the more common method of designation is on a case-by-case basis. This may be done by direct designation or through the facilities of various designating agencies. Here, too, the controlling arrangement is that worked out by the parties in negotiations and incorporated into their agreement. Generally, the pertinent contract language specifies that arbitration shall be used as the final step of the grievance procedure; that the parties are to meet to agree upon an arbitrator; and that if they are unable to agree on a mutually acceptable neutral, the matter of selection will be referred to one of the designating agencies.

Occasionally the language agreed to by the parties will limit the arbitrator to hearing only one case, but generally the parties agree that in the interest of speed and economy a number of grievances should be heard by one arbitrator and at one sitting if possible.

Efficient utilization of the ad hoc arrangement requires that the parties be fully familiar with the available neutrals and their prior awards. They must have sufficient faith in the process and in the integrity of the other party to overcome the prospect of a complete veto of names suggested by the opposite side. Use of the ad hoc arbitrator, as distinguished from the umpire, permits trying an arbitrator and later abandoning him if either party chooses not to use him in a subsequent case, or keeping him in for successive cases, just as long as the parties are satisfied and want to continue to utilize his services. The ad hoc arrangement probably makes more sense for those parties with a limited number of arbitration cases. It also permits the employment of an arbitrator with specialized expertise should the nature of a particular grievance so require.

It is essential in drafting the procedure for the designation of the ad hoc arbitrator that the parties provide language which will guarantee the selection of an arbitrator even if they are unable to agree upon one. For this reason, it is recommended that the parties set a time limit for the direct selection of a mutually acceptable arbitrator. After that, if they have not reached agreement, they should refer the selection of an arbitrator to a specified individual or agency pursuant to its own rules.

3. Designating agencies

There is no restriction as to who or what agency may be named as the body or individual to select an arbitrator in

the absence of agreement between the parties. They may agree upon a judge, a clergyman, or any other mutually selected individual to make the appointment. Far more common, however, is the practice of choosing one of the established designating agencies which maintain rosters of experienced neutrals. Among the most well knows of these agencies and the ones with the largest rosters are the American Arbitration Association (which is a private, non-profit organization), and the Federal Mediation and Conciliation Service. A number of state agencies also maintain rosters although they tend to be smaller and more localized in their membership.

Under the procedures of the American Arbitration Association, (AAA), which has 24 regional offices in the United States, the party appealing to arbitration will contact the AAA for a list of arbitrators. Such list will be tailored to any contractual requirements of the parties' agreement such as a specific provision for a list of five names, with each party striking alternative names until one remains. Absent such specific procedure, the usual practice of the AAA is to send out a list of nine names to each party. Each party marks its list by striking out the names of objectionable arbitrators, and listing in numerical order the remaining names according to preference. The lists are then returned to the AAA regional office which issued them. There the lists are compared and the highest mutual choice of the parties is designated as the arbitrator. In the event of non-agreement, new lists may be provided or a direct administrative appointment made by the AAA.

The AAA panel of labor-management arbitrators is composed of nearly 2,000 names of persons experienced in arbitration with a number of cases to their credit. All are required to have endorsement from employers and employee organizations in their geographic areas.

Adherence to the AAA rules not only assures the designation of a competent arbitrator but also that certain procedures will be complied with, such as the issuance of an award within thirty days after the close of hearings. The AAA staff arranges the time and location of the hearings, exchanges briefs, and distributes the award and arbitrator's bill to the parties. A nominal fee is charged for these administrative services and is equally divided between the parties.

The Federal Mediation and Conciliation Service (FMCS) operates its list in much the same manner. It has recently undertaken to speed up the designating process by having the listing and correspondence functions performed by computer. This agency is also authorized to make administrative appointments if the parties are unsuccessful in their use of the

lists. The involvement of the FMCS, however, terminates with the designation of the arbitrator. The staff does not become involved in any further administration of the case. The arbitrator is responsible for scheduling the hearing, exchanging briefs and distributing his award and bills to the parties. There is no charge to the parties for the FMCS' service in designating the arbitrator. The same is true for state agencies which only carry out the designating function. (Zack, pp. 13-14)

B. Qualifications of the Arbitrator

Arbitrators come from a wide variety of backgrounds. There are no special qualifications or certifications required of a person who wishes to serve as an arbitrator. From the parties' points of view, however, certain characteristics and abilities are important. An arbitrator should have an understanding of industrial relations and should have skill and expertise in interpreting collective bargaining agreements. Some estimate of these abilities may be made from biographies supplied by the various agencies, from discussion with other parties who may have used the arbitrator, and by examining awards written by the arbitrator. Such qualities as integrity and impartiality are difficult to assess, but an arbitrator must have demonstrated these traits in order to have been acceptable to other parties or to continue to be acceptable.

C. Compensation of Arbitrators

Zack explains below how arbitrators arrive at their fees and the sorts of expenses that the parties can expect to have to meet.

The growth of labor-management arbitration as a specialized service in the U.S. has led to its becoming a compensated profession. This is due to the great demand it places on a limited number of available neutrals. Fewer than one hundred individuals are deemed sufficiently acceptable to devote 100% of their time to arbitration.

The other few hundred who spend a sizable amount of their time in the practice of arbitration, reduce their availability for other economic pursuits. This arbitration, whether carried out on a full or part time basis, has become a means of livelihood for those engaged in it. It requires the maintenance of an office and the absorption of telephone, reproduction, secretarial and other overhead expenses. These costs are not usually passed on directly by the arbitrator to the parties. Rather, they are built into his fee as absorbed overhead. Arbitrators set their fees on a daily rate which at the present time ranges from $150 to $300, not including expenses. In a few jurisdictions where state agencies designate the arbitrators, a statutory rate is set as the daily fee. Where this set fee is too far below a busy arbitrator's regular fee, he tends to remove himself from the rosters of these designating agencies. Those on the roster are deemed to be qualified by the agency, their personal situations and availability enabling them to work at a lower fee.

The daily rate arrangement runs for each day of hearing, each day of executive session in the case of tripartite panels, and each day spent in study and preparation of the award. Arbitrators rarely charge by the hour, but many do charge for a half day of service when applicable. A daily rate for hearings has become standard due to the arbitrator's setting aside a full day out of his schedule for the parties. This deprives him of other work opppr-tunities for that day, particularly when travel time to and from the hearing location is taken into account. Thus the arbitrator is likely to charge the same daily hearing rate whether the actual hearing runs for three hours or eight. It is also possible that the arbitrator may charge for hearings held during the evening or hearings which run beyond the regular work day.

Some arbitrators also charge for travel time and for belated cancellations or postponements of hearings. These charges vary and may be ascertained by the parties in communication with the individual arbitrator or the designating agencies. All fees and travel expenses charged by the arbitrator are paid by the parties pursuant to the terms of the parties' Agreement. In nearly all cases the arbitrator's services are borne equally by the parties. In a few cases, the agreement stipulates that the arbitrator is to assess costs on the basis of 'guilt', i.e., to the losing party. This might appear to be the more equitable approach but the fact remains that the grievance and arbitration procedures are developed for the mutual benefit of the parties, regardless of who is at fault in a particular case. Additionally, many arbitration decisions, especially in discipline cases, are not a win or loss for either party. For the arbitrator to apportion responsibility in cases of reduced penalty, for instance, may require additional inquiry and/or additional hearings. This may spawn further hostility between the parties and set the stage for the filing of additional cases. (Zack, p. 16)

CODE OF PROFESSIONAL RESPONSIBILITY

for

ARBITRATORS OF LABOR-MANAGEMENT DISPUTES

As approved April 28, 1975, at the Annual Meeting of the National Academy of Arbitrators, Dorado Beach, Puerto Rico. The Code also was approved by the American Arbitration Association and Federal Mediation and Conciliation Service who are parties.

FOREWORD

This "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" is intended to supersede the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," approved in 1951 by a Committee of the American Arbitration Association, by the National Academy of Arbitrators, and by representatives of the Federal Mediation and Conciliation Service.

Revision of the 1951 Code was initiated officially by the same three groups in October, 1972. The Joint Steering Committee named below was designated to draft a proposal.

Reasons for Code revision should be noted briefly. Ethical considerations and procedural standards are sufficiently intertwined to warrant combining the subject matter of Parts I and II of the 1951 Code under the caption of "Professional Responsibility." It has seemed advisable to eliminate admonitions to the parties (Part III of the 1951 Code) except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators. Substantial growth of third party participation in dispute resolution in the public sector requires consideration. It appears that arbitration of new contract terms may become more significant. Finally, during the interval of more than two decades, new problems have emerged as private sector grievance arbitration has matured and has become more diversified.

JOINT STEERING COMMITTEE

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PREAMBLE

Background

Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chairman, Chairman of Arbitration Board, etc.) may suggest typical approaches but actual differences within any general type of arrangement may be as great as distinctions often made among the several types.

Some arbitration and related procedures, however, are not the product of voluntary agreement. These procedures, primarily but not exclusively applicable in the public sector, sometimes utilize other third party titles (Fact Finder, Impasse Panel, Board of Inquiry, etc.). These procedures range all the way from arbitration prescribed by statute to arrangements substantially indistinguishable from voluntary procedures.

The standards of professional responsibility set forth in this Code are designed to guide the impartial third party serving in these diverse labor-management relationships.

Scope of Code

This Code is a privately developed set of standards of professional behavior. It applies to voluntary arbitration of labor-management grievance disputes and of disputes concerning new or revised contract terms. Both "ad hoc" and "permanent" varieties of voluntary arbitration, private and public sector, are included. To the extent relevant in any specific case, it also applies to advisory arbitration, impasse resolution panels, arbitration prescribed by statutes, fact-finding, and other special procedures.

The word "arbitrator" as used hereafter in the Code, is intended to apply to any impartial person, irrespective of specific title, who serves in a labor-management dispute procedure in which there is conferred authority to decide issues or to make formal recommendations.

The Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is not authorized in advance to make decisions or recommendations. It does not apply to partisan representatives on tripartite boards. It does apply to commercial arbitration and to other uses of arbitration outside the labor-management dispute area.

Format of Code

Bold Face type, sometimes including explanatory material is used to set forth general principles. Italics are used for amplification of general principles. Ordinary type is used primarily for illustrative or explanatory comment.

Application of Code

Faithful adherence by an arbitrator to this Code is basic to professional responsibility.

The National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code and stands ready, through its

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Committee on Ethics and Grievances to advise its members as to the Code's interpretation. The American Arbitration Association and the Federal Mediation and Conciliation Service will apply the Code to the arbitrators on their rosters in cases handled under their respective appointment or referral procedures. Other arbitrators and administrative agencies may, of course, voluntarily adopt the Code and be governed by it.

In interpreting the Code and applying it to charges of professional misconduct, under existing or revised procedures of the National Academy of Arbitrators and of the administrative agencies, it should be recognized that while some of its standards express ethical principles basic to the arbitration profession, others rest less on ethics than on considerations of good practice. Experience has shown the difficulty of drawing rigid lines of distinction between ethics and good practice and this Code does not attempt to do so. Rather, it leaves the gravity of alleged misconduct and the extent to which ethical standards have been violated to be assessed in the light of the facts and circumstances of each particular case.

I. ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

A. General Qualifications

1. Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.

An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators.

2. An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.

B. Qualifications for Special Cases

1. An arbitrator must decline appointment, withdraw, or request technical assistance when he or she decides that a case is beyond his or her competence.

a. An arbitrator may be qualified generally but not for specialized assignments. Some types of incentive, work standard, job evaluation, welfare program, pension, or insurance cases may require specialized knowledge, experience or competence. Arbitration of contract terms also may require distinctive background and experience.

b. Effective appraisal by an administrative agency or by an arbitrator of the need for special qualifications requires that both parties make known the special nature of the case prior to appointment of the arbitrator.

C. Responsibilities to the Profession

1. An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.

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a. To this end, an arbitrator should keep current with principles, practices and developments that are relevent to his or her own field or arbitration practice.

2. An experienced arbitrator should cooperate in the training of new arbitrators.

3. An arbitrator must not advertise or solicit arbitration assignments.

a. It is a matter of personal preference whether an arbitrator includes "Labor Arbitrator" or similar notation on letterheads, cards, or announcements. It is inappropriate, however, to include memberships or offices held in professional societies or listings on rosters of administrative agencies.

b. Information provided for published biographical sketches, as well as that supplied to administrative agencies, must be accurate. Such information may include membership in professional organizations (including reference to significant offices held), and listings on rosters of administrative agencies.

II. RESPONSIBILITIES TO THE PARTIES

A. Recognition of diversity in Arbitration Arrangements

1. An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which he or she serves.

a. Recognition of special features of a particular arbitration arrangement can be essential with respect to procedural matters and may influence other aspect of the arbitration process.

2. Such understanding does not relieve an arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.

B. Required Disclosures

1. Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which he or she is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.

a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

2. When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, he or she must disclose such activities before accepting appointment as an arbitrator.

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An arbitrator must disclose such activities to an administrative agency if he or she is on that agency's active roster or seeks placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.

a. It is not necessary to disclose names of clients or other specific details. It is necessary to indicate the general nature of the labor relations advocacy or representational work involved, whether for companies or unions or both, and a reasonable approximation of the extent of such activity.

b. An arbitrator on an administrative agency's roster has a continuing obligation to notify the agency of any significant changes pertinent to this requirement.

c. When an administrative agency is not involved, an arbitrator must make such disclosure directly unless he or she is certain that both parties to the case are fully aware of such activities.

3. An arbitrator must not permit personal relationships to affect decision-making.

Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality.

a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

4. If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.

5. The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, he or she should withdraw, irrespective of the expressed desires of the parties.

C. Privacy of Arbitration

1. All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.

a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits. Occasionally, special circumstances may require that an arbitrator rule on such matters as attendance and degree of participation of counsel selected by a grievant.

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b. Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.

A commonly recognized exception is discussion of a problem in a case with a fellow arbitrator. Any such discussion does not relieve the arbitrator who is acting in the case from sole responsibility for the decision and the discussion must be considered as confidential.

Discussion of aspects of a case in a classroom without prior specific approval of the parties is not a violation provided the arbitrator is satisfied that there is no breach of essential confidentiality.

c. It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties.

An arbitrator may request but must not press the parties for consent to publish an opinion. Such a request should normally not be made until after the award has been issued to the parties.

d. It is not improper for an arbitrator to donate arbitration files to a library of a college, university or similar institution without prior consent of all the parties involved. When the circumstances permit, there should be deleted from such donations any cases concerning which one or both of the parties have expressed a desire for privacy. As an additional safeguard, an arbitrator may also decide to withhold recent cases or indicate to the donee a time interval before such cases can be made generally available.

e. Applicable laws, regulations, or practices of the parties may permit or even require exceptions to the above noted principles of privacy.

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a. Only an "arm's length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.

b. In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.

E. Jurisdiction

1. An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which he or she serves.

2. A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by the arbitrator as reliev-

ing him or her of further jurisdiction over such issues.

F. Mediation by an Arbitrator

1. When the parties wish at the outset to give an arbitrator authority both to mediate and to decide or submit recommendations regarding residual issues, if any, they should so advise the arbitrator prior to appointment. If the appointment is accepted, the arbitrator must perform a mediation role consistent with the circumstances of the case.

a. Direct appointments, also, may require a dual role as mediator and arbitrator of residual issues. This is most likely to occur in some public sector cases.

2. When a request to mediate is first made after appointment, the arbitrator may either accept or decline a mediation role.

a. Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision.

b. If one party requests that the arbitrator mediate and the other party objects, the arbitrator should decline the request.

c. An arbitrator is not precluded from making a suggestion that he or she mediate. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. An arbitrator must assume full personal responsibility for the decision in each case decided.

a. The extent, if any, to which an arbitrator properly may rely on precendent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.

b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with acceptance of full personal responsibility for the award

H. Use of Assistants

1. An arbitrator must not delegate any decision-making function to another person without consent of the parties.

a. Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator which does not involve the delegation of any decision-making function.

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b. If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of a case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion.

I. Consent Awards

1. Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.

a. Before complying with such a request, an arbitrator must be certain that he or she understands the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.

J. Avoidance of Delay

1. It is a basic professional responsibility of an arbitrator to plan his or her work schedule so that present and future commitments will be fulfilled in a timely manner.

a. When planning is upset for reasons beyond the control of the arbitrator he or she, nevertheless, should exert every reasonable effort to fulfill all commitments. If this is not possible, prompt notice at the arbitrator's initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.

2. An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays.

a. An arbitrator on the active roster of an administrative agency must take the initiative in advising the agency of any scheduling difficulties that he or she can foresee.

b. Requests for services, whether received directly or through as administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees arrangements should be made by agreement that the arbitrator confidently expects to fulfill.

c. An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay.

3. Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the labor agreement or as provided by regulation of an administrative agency or as otherwise agreed.

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a. If an appropriate award cannot be rendered within the required time, it is incumbent on the arbitrator to seek an extension of time from the parties.

b. If the parties have agreed upon abnormally short time limits for an award after a case is closed, the arbitrator should be so advised by the parties or by the administrative agency involved, prior to acceptance of appointment.

K. Fees and Expenses

1. An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of his or her work.

An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.

a. Services Not Primarily Chargeable on a Per Diem Basis

By agreement with the parties, the financial aspects of many "permanent" arbitration assignments, of some interest disputes, and of some "ad hoc" grievance assignments to not include a per diem fee for services as a primary part of the total understanding. In such situations, the arbitrator must adhere faithfully to all agreed upon arrangements governing fees and expenses.

b. Per Diem Basis for Charges for Services

1) When an arbitrator's charges for services are determined primarily by a stipulated per diem fee, the arbitrator should establish in advance his or her basis for application of such perdiem fee and for determination of reimbursable expenses.

Practices established by an arbitrator should include the basis for charges, if any, for:

a) hearing time, including the arbitration of the stipulated basic per diem hearing fee to hearing days of varying lengths;

b) study time;

c) necessary travel time when not included in charges for hearing time;

d) postponement or cancellation of hearings by the parties and the circumstances in which such charges will normally be assessed or waived;

e) office overhead expenses (secretarial, telephone, postage, etc.);

f) the work of paid assistants or associates

2) Each arbitrator should be guided by the following general principles:

a) Per diem charges for a hearing should not be in excess of actual time spent or allocated for the hearing.

b) Per diem charges for study time should not be in excess of actual time spent.

c) Any fixed ratio of study days to hearing days, not agreed to specifically by the parties, is inconsistent with the perdiem method of charges for services.

d) Charges for expenses must not be in excess of actual expenses normally reimbursable and incurred in connection with the case or cases involved.

e) When time or expense are involved for two or more sets of parties on the same day or trip, such time or expense charges should be apprixi-mately prorated.

f) An arbitrator may stipulate in advance a minimum charge for a hearing without violation of (a) or (e) above.

3) An arbitrator on the active roster of an administrative agency must file with the agency his or her individual basis for determination of fees and expenses if the agency so requires. Thereafter, it is the responsibility of each such arbitrator to advise the agency promptly of any change in any basis for charges.

Such filling may be in the form of answers to a questionnaire devised by an agency or by any other method adopted by or approved by an agency.

Having supplied an administrative agency with the information noted above, an arbitrator's professional responsibility of disclosure under this Code with respect to fees and expenses has been satisfied for cases referreed by that agency.

4) If an administrative agency promulgates specific standards with respect to any of these matters which are in addition to or more restrictive than an individual arbitrator's standards, an arbitrator on its active roster must observe the agency standards for cases handled under the auspices of that agency or decline to serve.

5) When an arbitrator is contacted directly by the parties for a case or cases, the arbitrator has a professional responsibility to respond to questions by submitting his or her basis for charges for fees and expenses.

6) When it is known to the arbitrator that one or both of the parties cannot afford normal charges, it is consistent with professional responsibility to charge lesser amounts to both parties or to one of the parties if the other party is made aware of the difference and agrees.

7) If an arbitrator concludes that the total of charges derived from his or her normal basis of calculation is not compatible with the case decided, it is consistent with professional responsibility to charge lesser amounts to both parties.

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2. An arbitrator must maintain adequate records to support charges for services and expenses and must make an accounting to the parties or to an involved administrative agency on request.

III. RESPONSIBILITIES TO ADMINISTRATIVE AGENCIES

A. General Responsibilities

1. An arbitrator must be candid, accurate, and fully responsive to an administrative agency concerning his or her qualifications, availability, and all other pertinent matters.

2. An arbitrator must observe policies and rules of an administrative agency in cases referred by that agency.

3. An arbitrator must not seek to influence an administrative agency by any improper means, including gifts or other inducements to agency personnel.

a. It is not improper for a person seeking placement on a roster to request references from individuals having knowledge of the applicant's experience and qualifications.

b. Arbitrators should recognize that the primary responsibility of an administrative agency is to serve the parties.

IV. PREHEARING CONDUCT

1. All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.

a. The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and particularly if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

b. Copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.

V. HEARING CONDUCT

A. General Principles

1. An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.

a. Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.

b. An arbitrator may: encourage stipulations of fact: restate the substance of issues or arguments to promote or certify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties

submit additional evidence, either at the hearing or by subsequent filing.

c. An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.

B. Transcripts or Recordings

1. Mutual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator.

a. A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.

b. An arbitrator may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one. However, if an arbitrator intends to make his or appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment.

c. If the parties do not agree to a transcript, an arbitrator may permit one party to take a transcript at its own cost. The arbitrator may also make appropriate arrangements under which the other party may have access to a copy if a copy is provided to the arbitrator.

d. Without prior approval, an arbitrator may seek to use his or her own tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

C. Ex Parte Hearings

1. In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances

2. An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing.

D. Plant Visits

1. An arbitrator should comply with a request of any party that he or she visit a work area pertinent to the dispute prior to, during, or after the hearing. An arbitrator may also initiate such a request.

a. Procedures for such visits should be agreed to by the parties in consultation with the arbitrator.

E. Bench Decisions or Expedited Awards

1. When an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.

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a. If notice of the parties' desire for a bench decision is not given prior to the arbitrator's acceptance of the case, issuance of such a bench decision is discretionary.

b. When only one party make the request and the other objects the arbitrator should not render a bench decision except under most unusual circumstances.

2. When an arbitrator understands, prior to acceptance of appointment,that a concise written award is expected within a stated time period after the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.

VI. POST HEARING CONDUCT

A. Post Hearing Briefs and Submissions

1. An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.

a. An arbitrator, in his or her discretion, amy either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.

2. An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.

B. Disclosure of Terms of Award

1. An arbitrator must not disclose a prospective award to either party prior to its simultaneous issuance to both parties or explore possible alternative awards unilaterally with one party, unless both parties so agree.

a. Partisan members of tripartite boards may know prospective terms of an award in advance of its issuance. Similar situations may exist in other less formal arrangements mutually agreed to by the parties. In any such situation, the arbitrator should determine and observe the mutually desired degree of confidentiality.

C. Awards and Opinions

1. The award should be definite, certain, and as concise as possible.

a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

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D. Clarification or Interpretation of Awards

1. No clarification or interpretation of an award is permissible without the consent of both parties.

2. Under agreements which permit or require clarification or interpretation of an award, an arbitrator must afford both parties an opportunity to be heard.

E. Enforcement of Award

1. The arbitrator's responsibility does not extend to the enforcement of an award.

2. In view of the professional and confidential nature of the arbitration relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings.

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IV. DECISION TO ARBITRATE

A. Necessary Considerations

In addition to decisions which must be based on technical factors, parties should consider several factors before proceeding to arbitration on a particular grievance. Among these are the strength of the complainant's case; whether there is a general principle which merits decision; whether the case or issue is important enough to warrant the cost; what the consequences of various decisions might be; and how the case or outcome of the case will affect future labor relations.

Zack discusses some considerations:

> Despite the importance of winning in arbitration, both sides will adknowledge that there are certain cases brought to arbitration with the expectation of losing. These are usually 'political' cases. Ideally they should not arise. Each party should attempt to resolve its internal problems before letting a case escalate to the arbitration step. Arbitration should not become a dumping ground for those cases in which the parties are incapable of policing their own organizations. Arbitration should not be a face saver for the loser. Realistically speaking, however, this does occur and at times even serves a valuable purpose in disposing of cases arising from uncomfortable personality problems and in restoring a harmonious relationship between the parties. Among the cases in this category are those involving the overreacting supervisor who, on impulse, discharges a highly competent, long service employee for a minor offense which really justifies only a warning or a one day suspension. The employer may not be willing to overrule the supervisor for fear of destroying his morale or his authority in the work place. Another example is the case of the grievance filed by the leader of an opposition group withing the bargaining unit, who had, indeed, been insubordinate or excessively tardy, or who had violated a provision in the agreement, but whose case the organization cannot abandon for fear of the resulting internal strife or leadership upset.
>
> Other cases in this category include those brought by the union because it seeks to show management that it has the militancy and resources to take a case to arbitration to counter management statements or the impression that the union is weak, divided or unable financially to afford such appeals. Or, a case may be appealed to show organization firmness in its original position in filing and processing the case through the several steps of the grievance procedure.

(IV. DECISION TO ARBITRATE)

Similar attitudes on the part of the employer may lead it to permit appeals of questionable cases to arbitration to make the same showings of firmness, solidarity, strength of resources and even militancy.

1. Reasons for the decision to take a case to arbitration

There are, of course, a large number of cases which are taken to arbitration without the certainty of winning and without the intention of saving face. These are the cases in which either or both of the parties seek resolution of a genuine difference of opinion to end unrest, uncertainty and tension. Sometimes, too, the decision to arbitrate is made with one eye on forthcoming negotiations over contract renewal, to strengthen one's case or to seek to deprive the other side of some of the strength of its position on a certain matter.

2. Who makes the decision

In most collective bargaining agreements the right of appeal to arbitration is restricted to the parties themselves. Nonetheless the contractual grant of authority to appeal does not necessarily reflect the realities of the political structure of management or the employee organization. Within the employee organization there is often a committee of officers which makes the decision on appeal. This committee may be subject to various pressures, and these may be reflected in its judgments as to whether or not the case has merit, as well as its decision to appeal.

On the management side, too, the decision to settle or to appeal may be fraught with political overtones. Here, though, the ultimate decision may rest in the hands of the highest administrative officer whose exposure to the daily labor management relations and to the role of arbitration may be limited. Management must also consider the impact of such determination on its other bargaining units and on its future negotiations. (Zack, p.12)

3. Technical factors

The technical factors which must be considered before proceeding to arbitration are whether the agreement provides for arbitration of the issue and whether the procedural requirements for dealing with the dispute, usually set forth in the grievance procedure language of the agreement, have been met. In some circumstances, parties lose meritorious grievances because of procedural flaws in the processing of the grievance at earlier steps.

THE AMERICAN ARBITRATION ASSOCIATION has published 9 steps for cutting arbitration costs:

1. Arbitration should be prompt. An important "hidden" cost in labor arbitration is the time lost to executives, union representatives and workers. The Cost of legal fees can also be significant. All of these items can be reduced by expediting the procedure. Furthermore, the "back pay meter" may be ticking while you are waiting for an eventual decision. Even where financial risk is not involved, a quick decision is usually better because keeping a grievant on the hook is bad for employee relations.

2. Don't order a transcript unless you really need it. Court reporting is expensive. Transcripts delay the award. The arbitrator can't start writing his opinion until he gets the record. Furthermore, arbitrators feel obliged to read every word. That means study time at the per diem rate. In some cases, transcripts are worth what they cost. But most of the time they serve only to double the total expenses of arbitration.

3. Question the arbitrator's fee if you think it is too high. The arbitrator is serving the parties. He should be paid a fair fee. Under AAA procedures, you are told his per diem rate in advance of his appointment. By reducing travel time, the number of hearings and study time, you have some control over the amount of the arbitrator's fee. When necessary, ask the AAA to speak up about an unreasonably high fee.

4. Clarify the issues before the first hearing. Why spend hours of hearing-room time establishing facts that aren't really in dispute? When parties come in prepared with the names and seniority dates of grievants, amounts of money involved and other details of record, it not only cuts hearing-room time but shortens the arbitrator's study time as well. In labor arbitration, the matter has already gone through the grievance procedure. A badly organized presentation serves no good purpose.

5. Sometimes, parties don't really need long opinions. Parties can ask the AAA to request the arbitrator to simplify or eliminate his opinion. In a few cases, it may be appropriate for the arbitrator to handwrite his award and a brief opinion at the close of the hearing, delivering it to the parties at once. If you don't need an opinion as a guideline for the future, consider the possibility of eliminating it. The arbitrator's bill will be substantially smaller. The dispute may be resolved sooner.

6. Avoid unnecessary citations. When parties indulge in needless citations they only compel the arbitrator to "go to the books" himself. That takes study time. Citation of awards by other arbitrators may be necessary in some situations. But be accurate. Don't rely on digests or headnotes alone. Above all, be selective.

7. The labor arbitrator is an experienced professional. Exercise restraint in submitting arguments about procedural matters. Generally, a simple but accurate presentation of your facts and arguments will put the sophisticated arbitrator in a position to make a decision.

8. Don't break your date with the arbitrator. When a hearing date is set, keep it. Don't ask for postponements unless absolutely necessary. The arbitrator is a professional man whose time means money. He may be turning down another case on the day when your hearing is scheduled. Some arbitrators make a charge for postponements on short notice. This custom will grow unless parties exercise restraint.

9. Find out about an arbitrator before you select him. A man who never arbitrated a job evaluation dispute, for instance, may have to be educated at your expense. Look up the arbitrator in the Summary of Labor Arbitration Awards and other reporting services. This will give you a better idea of his qualifications. If it's an AAA case and you need more information, don't hesitate to ask.

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V. ARBITRABILITY

A. Definition

The question of arbitrability arises when one party refuses to proceed to arbitration on the ground that the matter is not arbitrable, perhaps because it is not covered by the contract or because the grievance procedure has not been followed.

B. Submission of the arbitrability question

The parties may submit the issue of arbitrability to an arbitrator as a preliminary issue to be decided before proceeding to the issue on its merits. In this situation an arbitrator may:

1. rule on arbitrability before hearing the presentation on the merits
2. hear the full case and decide on the merits if the issue is found to be arbitrable.

It is possible to specify the procedures for determining arbitrability in the contract.

In case (1) above, the arbitrator may issue an oral ruling at the hearing and proceed to the merits.

The scheduling of additional hearing dates costs the parties money.

When a party agrees to participate in an arbitration hearing on the merits of a case, he does not necessarily waive his right to challenge arbitrability.

According to Benewitz, the question of arbitrability should be raised when the submission is written. Arbitrability is a threshold issue which the arbitrator must resolve before he can decide the issue on the merits.

Zack offers some further information on submitting the question to the arbitrator:

> The parties do not always agree that a case is arbitrable. Their grievance procedure may grant to one or either of the parties the right to appeal for arbitration. Very few cases would be appealed if joint agreement of the parties were necessary. In those cases which are appealed, however, the objection to arbitration may not be only because of the potential of losing on the merits. It may be based upon a legitimate belief that the dispute should not be before the arbitrator. As noted earlier, the issue of arbitrability is usually ceded to the neutral. This is done by the parties themselves or at the bequest of the courts.
>
> It is assumed that the parties' dispute is arbitrable unless either of them raises a challenge thereto. The challenging party must meet the burden of proving that a particular grievance is not arbitrable. The arbitrator takes evidence and hears argument on this threshold question prior to hearing the main case. It is desirable to obtain agreement on the arbitrability issue as well as on the main issue since the arbitrability challenge is, in fact, an issue itself. Thus the two issues can be joined, the main issue being coupled with the preliminary arbitrability issue. The actual phrasing might be: 'Is grievance #... arbitrable? If so ....?' and, proceeding to the stipulation of the submission on the merits or adding a stipulated issue on the merits the acknowledgement that, 'The employer challenges the arbitrability of the foregoing issue...'. Or, 'The parties agree that the foregoing issue will be decided only if the arbitrator overrules the employer's challenge to arbitrability.'
>
> Once there is agreement on the issue or issues to be decided, or at least an understanding that the arbitrator will formulate the issue, it is time to move on to the introduction of evidence. (Zack, p. 23)

C. Challenges to arbitrability

Challenges may be lodged in the courts or with the arbitrator of the appointing agency. The courts become involved when the parties seek an injunction pending determination of arbitrability, when one party seeks a court order compelling the other party to arbitrate, or when an award is taken to court

for review or enforcement.

The Supreme Court has ruled that questions of procedural arbitrability should be determined by arbitrators. Parties generally prefer to refer questions of arbitrability to arbitrators to avoid delays and costs.

1. Substantive Challenges

The potential challenges to jurisdiction fall into two categories: substantive and procedural. The substantive challenges to arbitrability are founded on the theory that under the agreement a particular matter is excepted from the arbitrator's authority. Thus, a grievance alleging that the discharge of an employee was improper would be beyond the arbitrator's jurisdiction if the parties' agreement specified that "the right of discharge is reserved to the employer and may not be appealed to arbitration," or, if the grievance protested a negotiated wage rate and the agreement excluded wage rate questions from arbitration.

2. Procedural Challenges

In the realm of procedural challenges to arbitration are protests that the procedural prerequisites for handling grievances up to and including arbitration have not been complied with. The argument is that the failure to adhere to such procedures is fatal to the grievant's right to have his claim heard on its merits in arbitration. Among the frequent procedural challenges are: the grievance was filed too long after the indident giving rise to it; the grievance does not specify all relevant contract provisions as required by the agreement; the limits on appeal were exceeded by one day on a particular step of the grievance procedure; or the grievant had, in fact, accepted an offer of settlemtnt in one of the lower steps of the grievance procedure, thus disposing of the claim.

The usual practice of arbitrators is to hear the challenges to arbitrability at the outset of the proceedings. Sometimes a bench opinion is offered by the arbitrator as to his jurisdiction over the case. More often, however, he will reserve judgment until he has had opportunity to review and examine his notes of the testimony, the evidence, and any arguments made by the parties either orally or in writing. Some arbitrators refuse to hear any evidence on the merits until they have issued their decision on arbitrability. But others, to avoid excessive delay and added cost occasioned by convening a second hearing after a written ruling sustaining the arbitrability of a dispute,

prefer to also hear the merits at the first hearing. They state to the parties, after hearing the arbitrability issue, that they will reserve judgment thereon and that since they and the parties are all present with time remaining in the work day, they will proceed to hear the case on its merits to avoid the necessity of arranging for and holding a second day of hearing.

By following this practice the arbitrator will be provided with that measure of extra information not brought to light in the jurisdictional proceeding and will be able to move on to a decision on the merits if he should find the case to be arbitrable. This avoids postponement of finality until after a second hearing is held on the merits, perhaps weeks or even months later, should arbitrability be sustained.

There arises a question of whether participation in any aspect of the arbitration proceeding by a party - even to argue against the arbitrator's authority - constitutes acceptance of the jurisdiction of the arbitrator. As in the court system it is possible for the party challenging the jurisidction of the forum to make a "special appearance." In so doing, the party appears for the limited purpose of presenting its viewpoint on jurisdiction without such appearance being considered a waiver of the right to challenge that jurisdiction.

A similar device may be invoked by a party challenging arbitrability, while at the same time taking part in the proceeding on the merits. By expressly stating that its participation does not constitute a waiver of any legal right it might have to protest the arbitrator's hearing of the case, such a reservation of rights may empower the protesting party to later have the award vitiated or denied enforcement on grounds that the arbitrator assumed execssive authority. (Zack, p. 9)

VI. WHAT IS THE ISSUE

A. Importance of Determining the Specific Point in Dispute

When a determination is made to appeal a grievance to arbitration it is important that the parties reach an understanding on the subject matter to be arbitrated.

An accord on the subject of the dispute is important for three reasons. Sometimes when there are a number of cases awaiting arbitration there may be error by one or the other party in preparing for the issue they think is to be arbitrated. Sometimes the parties also have different viewpoints astto what is the point of contention in a particular grievance. The latter may create the possibility of an apparent hostility even though none in fact exists. If the parties were to get together to discuss the subject matter of the dispute they might reach the conclusion that there is no real conflict and that the grievance was easily resolvable. This often happens when the parties bring in outside counsel or advisors who are removed from personal involvement and are thus likely to be more objective. They may advise their clients that it would be preferable to settle rather than carry the case into arbitration.

It is most desirable for all concerned if the parties also agree on the specific issue to be submitted to the arbitrator; this should be done well in advance of the hearing. This would provide not only an additional opportunity for settlement efforts between the parties but would also help to remove extraneous matters from the purview of the arbitrator. As a result the parties could focus on the crucial issue in their preparation of the case and eliminate costly delays which would result from seeking agreement at the outset of the hearing. If such a pre-hearing meeting is not held, or if it is unsuccessful, then the problem of framing the issue must be dealt with at the hearing before the arbitrator. (Zack, p. 17)

B. Submission Agreements

1. Definition

The submission agreement is a statement in which the parties spell out the nature of their disagreement and the general terms under which they want that disagreement settled. It may contain procedural details for the hearing, provision for payment of costs (if not detailed in the collective agreement), the scope of the arbitrator's authority, etc. Some submission agreements incorporate rules for the conduct

(VI. WHAT IS THE ISSUE)

of the hearing and limitations on the arbitrator's authority by reference, for example, to the rules of the American Academy of Arbitrators. (See AAA rules). It is preferable to formulate a new submission rather than to use the wording of the original grievance. One advantage of a meeting between the parties for purposes of agreeing on a submission statement is that reconsideration of the issue may lead to a settlement.

2. Purposes

Elkouri and Elkouri in 'How Arbitration Works' outline the following purposes of the submission agreement:

a) To define the limits of the arbitrator's authority
b) To identify the issue that is to be decided
c) To establish procedures if these are not contained in the collective agreement.
d) To meet statutory requirements if these exist
e) "In cases not covered by state or federal law, making agreements to arbitrate future disputes specifically enforceable, to provide a contract after the dispute has materialized"
f) "To confirm the arbitrability of the particular dispute"
g) To provide another possible arena of settlement; further discussion of the issue may reveal unexplored areas of agreement. (Elkouri and Elkouri, p. 185)

3. Wording

The wording of the submission is particularly important. It

must be drawn in such a manner as to allow the arbitrator to serve the parties in deciding the issue which concerns them. Carelessly worded submissions sometimes result in decisions that fail to solve the problem.

C. Framing of the issue by the arbitrator

Parties may ask the arbitrator to pinpoint the issue. Agreements sometimes provide for the arbitrator to do so in the event that the parties are unable to state the issue themselves.

D. Remedy

An integral part of framing the issue is anticipating the possibility of a remedy should the grieving party win. Some courts have held that the arbitrator is powerless to grant a remedy without specific authority in the submission granting that authority. The parties may thus be confined to a determination of whether or not there has been a contract violation without the possibility of restitution for the wrong done. This problem arises infrequently and is usually due to oversight by the parties in their framing of the issue. But it is essential to the arbitrator that he assures himself that he has the power to deal with remedy if it becomes pertinent. If he is not provided with that authority, the losing party might well have strong legal grounds to prohibit the enforcement of the award on the theory that the arbitrator exceeded his authority. Such authority can be extended to the arbitrator by agreement on the simple clause, "What shall be the remedy, if any?" (Zack, p. 23)

E. Using the Original Grievance

Don't use the original grievance.

The grievance as drafted by the individual employee may not be an accurate reflection of the issue to be resolved. In filing the grievance the employee may not have consulted the representatives of the organization and, as a result, may have phrased his grievance in such a way as to obscure the real issue.

For example, an employee who felt he was improperly denied a promotion due him on the basis of seniority and qualification might have worded his grievance in terms of having been personally discriminated against when the position was filled by a junior employee.

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Second, the grievance may not contain an adequate statement of the claim sought. An employee who filed a grievance claiming unjust discharge five days after the date of his termination might seek as his remedy one week of back pay. If the case is brought to arbitration three months later and the employee is found to be innocent, the arbitrator might be precluded by the wording of the grievance from granting the employee the three months' back pay to which he is entitled. Or, even more dramatically, the grievance might omit any reference to remedy, merely claiming that the discharge was improper or that the employer promoted the wrong individual. Here too, the employer might argue successfully that the arbitrator would be exceeding his authority to award a remedy when none was requested in the original grievance.

Third, it is to the mutual advantage of the parties to ensure that the arbitrator decides the issue which has been the subject of discussion during the processing of the grievance. A grievance which protests unjust discipline for excessive absenteeism may, during its processing through the grievance procedure, have evolved into a dispute over the employer's right to unilaterally promulgate rulse on tardiness and attendance. Failure of the parties to agree upon an issue which focuses on this problem might deprive the employer of the opportunity to confirm its right to "direct the work forces," etc. Instead it might lead to an award which ignores the underlying problem and focuses on the narrow issue of whether the grievant's tardiness on a particular day was or was not justified. To resolve only the narrow issue would deprive both parties of the constructive role intended for the arbitration process. (Zack p. 22)

Sample Submission

IN THE MATTER OF THE ARBITRATION BETWEEN	
AND	Submission Agreement
CASE NO: _____	

We, the undersigned, parties agree to submit the following controversy(s) to MAURICE C. BENEWITZ for his final and binding AWARD:

_____
For the Union

_____
For the Company

Dated:

_____

_____

VII. PROCEDURES PRIOR TO ARBITTATION

A. Arranging for the Hearing

Once the decision to arbitrate a dispute is made, it is necessary to notify the arbitrator and arrange for a hearing room. Each party must also prepare copies of exhibits and arrange for the use of a reporter if one is desired.

The method of notifying the arbitrator depends upon whether the arbitrator is a permanent umpire, an ad hoc appointee chosen by the parties, or a designee of an agency. In the first case, an informal contact should be sufficient. If the parties have chosen an arbitrator from a list, it is customary to inform him or her in a formal letter introducing the parties and providing some information about the case. Sometimes suggested hearing dates and a place are suggested. If an appointing agency is involved, the agency will inform the arbitrator and, after consulting with the arbitrator and the parties, will set a time and place for the hearing.

B. Costs

In addition to the arbitrator's compensation for the hearing day, preparation time and travel expenses, all of which are usually divided equally by the parties, there are other costs. Each party bears the expenses of the preparation and presentation of their own case. This includes the fees and expenses of outside consultants and/or attorneys, travel expenses of witnesses, reproduction of exhibits, photographs, maps, charts and the like. The organization, by contractual provision, may also have to bear some or all of the costs of released time or substitutes for witnesses. Additional costs, such as the hearing room charge and stenographer's services are traditionally shared equally by the parties if jointly agreed upon.

Transcripts are generally not requested by the arbitrator, who usually takes his own notes of the hearing. However there are a few arbitrators who will not accept a case unless there is assurance of a stenographer being present. There are some cases where the verbatim testimony of certain witnesses is valuable to the arbitrator, as in the case of con-

tradictory testimony or credibility contests. In such cases the arbitrator may welcome the opportunity to be freed from notetaking in order to observe the demeanor of the witnesses. Transcripts may also be valuable when the dispute involves extensive detailed data. But, by and large, arbitrators are able to handle the receipt of testimony through their own notes. Transcripts are more often of importance to the parties in providing a detailed record of the proceedings and as an aid in preparing post-hearing briefs.

When transcripts are ordered by only one party, that party usually bears the full cost. Many arbitrators refuse to receive a copy of the transcript unless it is being made available to the other side. When this occurs, the parties generally share the cost of the transcript.

The presence of a stenographer can also inhibit the arbitrator as well as the parties in undertaking any efforts toward settlement during the hearing and may lead to a more formal and longer hearing as the spokesmen direct their remarks to the record for posterity. Finally, transcribing of the notes into a typed transcript adds at least ten days to two weeks to the processing of the case cost to the parties which might even exceed the fees of the arbitrator. (Zack, p. 21)

C. Pre-hearing Meetings with the Arbitrator

Between the appointment and the hearing dates, it is the accepted practice that neither party will discuss the case with the arbitrator unless a joint meeting is requested by both parties. Sometimes arrangements are made to present the arbitrator with the submission agreement or prehearing briefs. This practice may save time at the actual hearing by providing the arbitrator with some insight into the case. It should be noted, however, that lengthy briefs add to the cost of arbitration by increasing the arbitrator's study time.

D. Postponements and adjournments

Postponements cost the parties money and are unfair if one party seeks them as a way of delaying a decision or imposing costs on the other party. They also defeat a major advantage of the system which is to provide expedi-

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tious settlement of a dispute. Many arbitrators charge for a day of hearing if a postponement is not sought at least a week in advance of the hearing date.

VIII. PREPARING THE CASE FOR ARBITRATION

A. Checklist. The following checklist has been formulated from How Arbitration Works by Elkouri and Elkouri, p. 198.

1. Review history of the case and its processing.
2. Study agreement and note clauses that pertain to the case. Review prior agreements as they might apply.
3. Determine whether the matter is arbitrable; check the arbitration clause of the agreement.
4. Talk to persons who were involved in the case or might have information about it.
5. Interview witnesses to find out what they know; to clarify their relationship to the case; to acquaint them with cross examination procedures.
6. Examine all written documents; make copies for the other party and for the arbitrator. Secure copies of documents in possession of the other party if possible.
7. Develop visual exhibits if appropriate.
8. Take note of past practice in similar situations.
9. Review the standards for interpretation of contract
1 language.
10. Review awards in similar disputes
11. Prepare an outline of the case to facilitate orderly and logical presentation.

B. Evidence

Items 2 and 3 have been discussed in other sections. Zack discusses some aspects of data collection and selection of witnesses.

Ideally, data collection is carried out immediately after the incident leading to the grievance when the recol-

lection of events is fresh in the minds of witnesses and the relevant exhibits readily available. Any such evidence which was found to justify the filing of the grievance should be retained as evidence for the arbitration hearing. The observations of witnesses should be put in writing with full detail and be signed and dated. The passage of time between the incident and the hearing frequently leads to inaccurate recollections or even unavailability of witnesses due to illness or death. Such written statements may become the only available data as to what transpired. Too frequently, such foresight is not exercised, and the need for detailed data is not realized until the preparation of the case for the arbitration step. Collecting accurate accounts of events that transpired several months earlier is difficult. Recollections become hazy. They become "confused" by intervening events, by prejudices, by personal motives and by statements made by other witnesses in the early steps of the grievance procedure. Nonetheless it is important to have all available witnesses present their respective versions of the facts and for the arbitrator to distill therefrom the version which appears to be the most credible. It is also wise to anticipate the other party's version of the incident so that convincing refutation is available. It is risky but often necessary to attempt to elicit the recollections of witnesses on the other side at the hearing. In questioning, to find material to support the cross-examining party's case, there is always the risk that a refutation will come forth. It may be worthwhile to secure the testimony of individuals outside the employment relationship such as physicians, police officials, neighbors of the grievant and the like. They may help to strengthen one's case and to prepare against surprises in the other side's presentation. Sworn affidavits from such individuals may be presented if the persons are unable or unwilling to attend the hearing. If such "experts" are unable to be present, their affidavits may be accepted into evidence by the arbitrator.

Even in cases where there is little conflicting evidence regarding the crucial issue, the parties must still collect all relevant information for presentation to the arbitrator. Who is the grievant? (List his name, address, job classification, job description, rate of pay, date of hire, past positions.) What is his prior disciplinary record? What has been his job performance and demonstrated work capabilities? Who else is affected by this grievance? Does the grievance accurately reflect the demand of the grievant? Does it raise an underlying or ancillary issue which the other party may be planning to emphasize in the presentation of its case? (Zack, p. 17)

C. Witnesses

According to Benewitz: "the first thing you should do when you decide that a case is going to arbitration is to determine

what witnesses you need. Call them in and ask them what was said, what happened -- all the facts." He cautions that witnesses should not hesitate to admit on cross examination that they have discussed the case with one of the advocates. That is not to say that witnesses should be coached, but rather that is is natural and important that the events and facts in a situation that gets to arbitration should have been discussed. He also suggests that witnesses be told not to speak more than necessary; not to explain answers; not to interpret the contract, and not to give "philosophical disquisitions to the arbitrator."

Benewitz also warns that an advocate must know what the witness will say when testifying. (oral presentation)

In arbitration, as contrasted with the courts, there is less need for protecting the finders-of-fact from evidence of questionable validity or authenticity. The parties have specifically invoked a procedure of their own creation and have designated a finder-of-fact whose judgment and competence they presumably respect. Generally he has had enough exposure to the judicial and/or arbitration process to recognize what information is relevant and germane and what is extraneous to his job of rendering a decision based upon the facts. Presumably, like anyone experienced in dealing with adversaries, he can distinguish between who is telling the truth and who is not. (Zack, p. 29)

D. Other Arbitration Decisions

Other arbitration decisions rendered by the same or other arbitrators, particularly if between the same parties, should be searched out and examined. Even decisions involving a like issue but between different parties are of value in ascertaining an understanding of an arbitrator's reasoning process which might be crucial to the instant case. (Zack, p. 18)

Once material has been gathered, the parties should prepare an outline of the presentation. It is most important that

(VIII. PREPARING THE CASE FOR ARBITRATION)

the case be presented in an orderly and logical way. The arbitrator needs to have some of the background leading to the grievance. The opening statement should be prepared in advance and should give the arbitrator an idea of the facts which are expected to be brought forth in testimony and exhibits. It is not necessary, however, to reveal one's whole case if that is not desirable.

It is important to keep in mind the other party's position as it is necessary to refute those points.

E. Remedy

Finally, attention should be paid to preparing arguments on the remedy. Even for the employer, it is desirable to deal separately with the remedy question. Such argument is without prejudice to the main contention on the merits in the event the grievance is sustained and is directed, in the alternative, to the proposition that the remedy requested by the organization is excessive, unwarranted, or violative of the agreement or past practice.

Probably the most important aspect of case preparation is in the development of the argument. As noted above, there must be careful scrutiny of all testimony and documents to come forth with a convincing analysis thereof, leading to a favorable award. In developing this analysis, it is important to limit provisions of the agreement and exhibits to those which are most relevant. Trivia which may be misleading to the arbitrator as well as challenged by the other side should be excluded. In addition to those arguments based upon the agreement itself, there should be an exploration of human interest or common sense arguments which might excuse or justify certain conduct, support the reasonableness of the employer's or the employee's action, or mitigate the penalty to be imposed. Such arguments may be of particular importance where the agreement is ambiguous or where there is a conflict between the contract and past practice. (Zack, p. 18)

In disputes over proper interpretation of contract language where factual matters are not in dispute, it is often desirable to prepare stipulations in advance.

IX. HEARING ROOM PROCEDURE

A. The General Picture

In general there are some arbitrators who are very formal, very good arbitrators, who take opening statements, say very little, rule on objections as crisply as possible, and go away and write the award. There are other arbitrators who participate, ask questions, and go away and write the same award, and who say more, and who are less formal. But it is not only the arbitrator who determines what will go on in the hearing room; it is the parties too. If it becomes very clear to the arbitrator that he is dealing with people who are bitter adversaries, he will run, ordinarily, a very formal, very controlled, brief, and very cold hearing. He will do that because it is one of his functions to maintain order, and to get, in some orderly way, what the contentions of the parties are, and then to decide the case. (Benewitz, oral presentation)

Swearing Witnesses

If the parties to the dispute think that placing witnesses under oath will give more dignity to a situation, the arbitrator will swear them in. If one of the parties feels that placing the witnesses under oath is more likely to elicit the truth, the arbitrator should be requested to do so. Does the arbitrator really want them under oath? No, he's got to sit and look at them and judge their credibility whether they're sworn or not -- that's his job. (Benewitz, oral presentation)

(IX. HEARING ROOM PROCEDURE)

Zack comments further on swearing witnesses:

> When the first witness is called, a preliminary issue arises concerning the swearing in of witnesses to testify under oath. This practice, common in court proceedings, is often waived in the less formal arbitration proceedings. Yet it may have particular value where the conflict between the parties centers on the credibility of certain witnesses. Whether or not witnesses are to be sworn is usually decided by the parties, since the arbitrator will generally proceed with whatever determination they have made. If there is a conflict over the swearing of witnesses, the arbitrator generally rules that the testimony will be given under oath and he will swear the witness. The oath generally used is, "Do you swear (or affirm) to tell the truth, the whole truth and nothing but the truth, so help you God?" (Zack, p. 24)

C. Visits to the work place

> In some cases the factual presentation involves complex descriptions of the work area layout, the flow of work, or the details of a particular job. In such circumstances it is not uncommon for one or both parties, or even the arbitrator himself, to request that a visit be made to the location concerned. Such a visit can be made prior to the testimony, but it is likely to be more meaningful if made after presentation of the testimony. Generally, one or two representatives from each side will accompany the arbitrator to explain the details of what is being viewed and to answer any questions he might have. (Zack, p. 25)

D. Postponements

> Sometimes the presentation of testimony results in the introduction of new evidence which catches the opposing party by surprise. In such situations there may be a request by the other side for a postponement in order to research the new development, study it, and prepare a response. If the arbitrator is convinced that the newly introduced evidence does in fact constitute surprise, and is of sufficient importance to the case, he will usually grant the requested postponement. Postponements may also be granted if a crucial witness is unable to be present on the scheduled day of the hearing. (Zack, p. 25)

E. Exparte hearings

> The rules of the American Arbitration Association provide
>
> in Rule 27 ("Arbitration in the Absence of a Party") that
>
> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as he may require for the making of an award.

X. THE HEARING

A. Opening the Hearing

Generally the parties arrive independently of one another at the appointed location. The arbitrator should introduce himself to all present if he has not dealt with them before. The parties generally take positions on opposite sides of the table. If it appears that one or both parties are unfamiliar with the process, the arbitrator might indicate the sequence to be followed: agreement on the issue, opening statements, examination and cross examination of witnesses, and closing arguments. A sheet of paper may be passed around on which participants record their appearances listing names and titles. All of this should be done in a way that establishes a tone of informality for the hearing to follow. Sometimes the relationship between the parties may dictate a somewhat more formal approach. (Zack, p. 22)

B. Order of Proceeding

The question of the order in which the case is to be presented by the parties may be disputed. Although arbitration proceedings are not as strict as court proceedings in matters of burden of proof, it is customary for the moving party (the side which took the initial action resulting in arbitration) to begin the presentation. Thus, in most cases involving contract interpretation, it is the employee organization which goes first, since they are the "moving party" challenging the status quo. In cases of challenge to disciplinary action, it is customary for the employer to to first even though the case may have arisen from a grievance filed by the organization. This is done on the theory that the employer took the precipitating action of imposing the discipline. Also, the employer is likely to have greater command of the facts as well as records dealing with the employee's background. Once the determination is made of who goes first with the opening statement, this order carries through to the commencement of evidence. The order is generally reversed in the presentation of closing arguments on the theory that the party who opens the hearing should have the last word, i.e., the right to close it.

Sometimes the parties get into vigorous arguments as to who should proceed first, each urging the other a la Alphonse and Gaston. The wise arbitrator stays out of such disputes except to point out that both sides will have equal opportunity to put into evidence anything they wish, or to point out what is the general practice on order or proceeding. (Zack, p. 22)

C. Opening Statements

1. Zack's view

It is helpful to the arbitrator to gain an overview of the issue as early as possible in the proceedings. In this way he can respond more intelligently to the evidence as it is introduced throughout the hearing. For this reason,

opening statements, either oral or written, are of particular value to the arbitrator who, it must be remembered, has no prior knowledge of the conflict between the parties. In it they provide him with their theories of the case and call his attention to the items which they intend to prove in their presentations. It is accepted practice that the opening statement be presented without interruption or objection from the other side.

Despite its value to the arbitrator, the provision of an opening statement may be objectionable to either of the parties if it reveals prematurely their plan of attack. For this reason one or both of the parties may not be willing to present an opening statement and the case will proceed without such openings. (Zack, p. 24)

2. Benewitz's view

I will explain to the parties when I convene a hearing, even before I take a submission, that once the submission is written and signed I shall expect opening statements from them which are not evidence but which tell me what I can expect to hear, what the parties intend to attempt to prove; what contract language they intend to go on; what types of evidence they intend to offer as exhibits; what documents and other evidence they intend to present insofar as they can get it. (Benewitz, oral presentation.)

D. Order of Presentation

The first thing to put in is the contract and/or board regulations of the industry involved, if board regulations in writing or other things are properly put before the arbitrator on the basis of the language of the agreement. If they are not, presumably somebody will object to their being entered. Second, there should be entered a statement concerning what contract sections are appropriate. If the witness who is being asked these questions is asked to interpret

the section, presumably the other attorney will properly object, because the function of interpretation is not for the witness. The witness may point to things that he thinks are appropriate. The arbitrator is hired to interpret, and the representatives are there to tell the arbitrator how they think he should interpret it, at a proper place in the proceedings. But that isn't during testimony. The other attorney, if he thinks the witness is telling something he doesn't want the arbitrator to hear, will object. If he thinks he'll tell him something he does want him to hear, he won't object. But that's a matter of strategy and tactics. On the other hand, sometimes a question will be asked on cross-examination that will be missed by a representative or attorney and a witness will be permitted to answer a question that should not have been allowed.

Here is an example of how to avoid this: Question to witness: "Now, Mr. Zilch, it says here that a duty period will not be changed. What do you think the duty period means?"

What should be done in such a case? The representative or attorney should say "Mr. Arbitrator, it is not the function of the witness to interpret the language of the contract, that is your function."

Once the order of proof is in and a prima facie showing is made, then the other side will try to bring down the whole proof. (Benewitz, oral presentation)

(X. THE HEARING)

E. Presenting evidence

The thrust of each party's case is made through the testimony of witnesses. These are the individuals who report each side's version of a disputed event, what was said in negotiations or meetings, what has been the accepted way of doing things over the years, and so on.

1. Witnesses

The party which made the first opening statement presents the first witness. Hopefully, the first witness called will be the one to present the background facts of the case or to commence the chronology of events. This witness, like others to follow, will first be asked his name, position or title, years of employment, etc. The witness is examined by the spokesman for the side calling him to the stand on whatever matters the spokesman feels he is competent to testify. This is the direct examination. The questions should be phrased in such a way as to avoid leading the witness. Questions which merely require a 'yes' or 'no' response leave little opportunity for meaningful cross-examination by the other side. Spokesmen should ask the questions in such a way as to permit the witness to testify from his own recollection of what transpired. When the direct examination has elicited all the pertinent information which the spokesman wishes to introduce, the party examining the witness rests. This concludes the direct examination and opens the witness to cross-examination by the spokesman for the other side.

The cross-examination may be aimed at further clarification or may be intended to discredit or impeach the direct testimony of the witness. The other party, in cross-examination, seeks to have the witness add to his earlier testimony such information as might detract from his earlier statements or otherwise weaken his opponent's case. In cross-examination greater leeway is allowed in leading the witness to the desired testimony, but cross-examination is generally confined to the subject matter dealt with by the witness in his answers to the direct examination. After the opposing party has exhausted his questioning of the witness, he, in turn, rests, and the right to question is passed back to the original party's spokesman for re-direct questioning. This provides a chance to rehabilitate the witness' testimony or perhaps to expand on views which had not adequately been explored earlier. Re-direct examination and re-cross examination continue in this manner until the opposing counsel both feel that the witness has nothing further to contribute on the items in dispute. The moving party proceeds with its remaining witnesses until it has called them all to the witness chair. The same procedure is followed for the testimony of each witness.

When the roster of witnesses for one side is exhausted, the opposing party commences the presentation of its case. If it waived its right to an opening statement at the commencement ...of the hearing, it might make such a statement at this time. Otherwise, it begins with its witnesses, following the same procedure as did the moving party, with direct examination followed by cross-examination, then re-direct and re-cross, etc. This is done for all of the opposition's witnesses until their testimony is fully introduced. The arbitrator usually asks any questions he may have at the conclusion of the examination of a witness, although he may interrupt earlier for clarification.

In some cases, particularly those involving discipline or discharge, there may be such contradictory testimony anticipated that one of the parties may request sequestering of the witnesses. If the other party agrees on which witnesses should be sequestered, arrangements are made to place them in a different room until it is their turn to testify. They are then brought into the hearing room and later returned to isolation or permitted to stay in the hearing room. In such cases it is common practice to permit the accused employee to remain in the hearing room throughout the proceeding for the purpose of 'confronting his accusers.' The arbitrator may be called upon to rule on a number of questions concerning the arrangement, such as whether witnesses from both sides should be kept together, whether a witness should return to the witness room after testifying, etc.

a) Direct Examination - Leading the Witness

The primary problem of the leading question is that it may put in the mouth of a witness the answer to a question which does not in fact conform to the witness' knowledge.

As a general rule, on non-controversial matters, such as the employee's background, his job history, etc., the arbitrator should in fact encourage the use of leading questions. On issues of fact which are central or close to the crucial issue, leading questions should be discouraged. Here the arbitrator, particularly in ad hoc arbitrations, is on safer ground to withhold admonition in the absence of an objection. In some relationships the parties have customarily permitted wide latitude as to the form of question. The presence or absence of attorneys may be a relevant factor. Where one side is represented by a layman and the lawyer on the other side appears to be taking advantage of the situation, the arbitrator may be justified in requesting that the questions be rephrased.

b) Scope and Tactics of Cross Examination - Arbitrator's Responsibility to Protect Witness from Improper Tactics.

The arbitrator plays a crucial role in the proceedings. He should discourage and shut off improper tactics such as redundant cross examination, abuse or intimidation of witness

by threats or otherwise, the putting of involved questions not susceptible of intelligent response, shouting at witnesses, standing over witness, and the making of unseemly gestures.

In certain situations where tense emotional attitudes develop, it may be necessary for the arbitrator to overlook an emotional outburst. But in general it is the arbitrator's responsibility to prevent the proceedings from degenerating into a donnybrook. Calmness, patience, and a dignified demeanor by the arbitrator are essential requisites to the successful conduct of an arbitration hearing. It is generally his example that will guide the parties.

In general, if a party has witnesses who can establish the essential facts by direct testimony, cross-examination to elicit such facts is a waste of time. We do not, in general, believe that the scope of cross-examination should be restricted to the scope of direct. Where the cross-examination appears to be getting into irrelevant matters, and objection is made, the arbitrator would do well to ask for an explanation of the purpose of the questions. Sometimes the zeal of an advocate may take him far afield and he may appreciate being guided back to the issue.

It is difficult to generalize as to the allowable latitude. Cross-examination should not be interfered with unless it appears obvious that the questions have no bearing on the issues before the arbitrator or that the witness is not competent to answer the questions.

c) Impeaching the Witness

There should be no limitation in efforts to impeach a witness, particularly where cross-examination is used to establish facts which are to be followed up by direct testimony. But impeachment does not mean harassment - and an arbitrator has an obligation to protect a witness from excessive badgering or repetitive examination on the same subject matter. (NAA procs., p. 8-9)

2. Exhibits

Unless the parties agreed to the joint submission of exhibits at the start of the hearing, it is likely that records, correspondence, charts and other data will be offered for admission through the various witnesses whose testimony is related to such data. The exhibit to be introduced is marked for identification by the arbitrator as an employer or employee exhibit used for questioning the witness and, if there is no objection by the other party, received by the arbitrator as an exhibit. Frequently there are objections to the introduction of an exhibit on grounds of immateriality, irrelevance, inaccuracy or the like, as

will be discussed below. It is up to the arbitrator to rule on whether or not the exhibit will be received. Sufficient copies of exhibits should be made available to supply all parties. The arbitrator numbers the exhibits in the order of their introduction into evidence, and retains a set for his subsequent use in preparing his decision. (Zack, p. 25)

3. Joint Exhibits and Stipulations

In most cases both parties intend to base their presentations at least in part, upon certain records or documents which are in the possession of both parties. Accordingly, it facilitates the hearing and eliminates the need for time-consuming testimony of numerous witnesses to agree upon the introduction of exhibits which both parties accept without challenge. Traditionally, the applicable collective bargaining agreement is introduced in this manner and marked as Joint Exhibit #1. So, too, is the grievance itself, including the answers thereto which may be found on the same, or attached pages. Prior agreements, joint minutes of negotiating sessions, correspondence between the parties, prior arbitration awards between the parties, may all be handled in this fashion. How far the parties are willing to go in the initial submission of exhibits, depends upon their prior experience in dealing with each other and their intention to withhold exhibits until later in the proceeding for their surprise value. There may also be a preference for having the exhibits marked on the basis of the party introducting them, i.e., Employer's Exhibit #1 and Union Exhibit #1, etc. It is most common that the bulk of the exhibits will be introduced during the examination and cross-examination of witnesses.

Following the introduction of agreed-upon exhibits, it might be possible to get agreement on the factual elements of the case. This is most likely to occur in those disputes where the issue hinges on a question of contract interpretation, rather than fact. By achieving such agreement, called a stipulation of facts, it may be possible to forego extended testimony by witnesses. Sometimes all the facts can be so agreed upon, while at other times the agreement may be limited to the grievant's work record, prior disciplinary record or the genesis of a past practice. Quite frequently the relationship between the parties precludes achieving any stipulation. In such cases efforts to obtain a stipulation may take more time than the testimony of witnesses. (Zack, pp. 22-23.)

F. Argument By the Parties

Once the factual material has been introduced by oral testimony and exhibits, it is time to proceed to the arguments. These are the parties' interpretations of the pre-

sented evidence in support of their respective positions. The parties should decide between themselves whether they wish to make their arguments orally as part of the hearing or subsequently in post-hearing, written briefs. Oral argument is much more expeditious, avoids a delay of several weeks while briefs are being prepared, and is more likely to provide a clear focus on the issues.

On the other hand, oral argument requires a ready facility in absorbing all the material that has been introduced and arranging it in a logical and convincing fashion for integration into the closing argument before the arbitrator. Most arbitrators leave the choice to the parties. They will permit briefs from both parties if one party wishes to file one. Some arbitrators prefer a short oral argument at the close of the hearing, even if this is in addition to briefs, so that they might have an opportunity to see if they fully comprehend the arguments of both parties. This will also provide an opportunity to raise any questions that the arbitrator may have on the arguments, an opportunity which will not exist after the briefs are filed. In most cases the parties are content to rely on oral arguments.

The parties generally reverse the order of presentation for closing arguments, with the moving party going last. The parties highlight what they believe to have been the important elements of the testimony, significant exhibits, relevant portions of their contract, previous arbitration awards, and other documents which are felt to have a bearing on the case, and tie them into their argument. The spokesmen usually respect each other's right to complete their argument without interruption and save any contradictory statements or rebuttal until later. Here, too, the arbitrator will permit the parties to continue their presentations until they are satisfied that everything has been covered. Once the argument is concluded, unless there is a provision for filing post-hearing briefs, the proceedings are closed.

G. Post-hearing Briefs

Post-hearing briefs are often filed by the parties to set forth their interpretation of the facts and their arguments in support of their case. If they are to be filed, it is necessary to agree on a deadline for their submission. This is usually set for two or three weeks after the receipt of the submission. This is usually set for two or three weeks after the receipt of the transcript if one is taken. At such time the briefs are sent to the arbitrator while the parties exchange copies between themselves. The American Arbitration Association handles the exchange of briefs in cases handled by them. The preparation of briefs permits a more careful examination of the testimony and the exhibits than the making of oral arguments. As a result, the brief tends to be more thorough, detailed, and sometimes repetitive.

The parties are free to make any arrangement they wish for the filing of briefs, but they should refrain from the endless exchange which results from filing replies to each other's briefs. They are well advised to agree on a single simultaneous filing, rather than permit any rebuttals. These added steps only delay the final decision while adding relatively little to the information available to the arbitrator for preparing his decision.

It is understood that the brief is to be based solely upon the materials presented at the hearing and that no new factual material not exposed to direct and cross-examination will be included. When the briefs are filed the case is closed. No further statements, evidence, or argument of the parties or by order of the arbitrator. The closing of the case begins the funning of the time for the arbitrator to prepare his award, which under some state laws and pursuant to the rules of the AAA, must be rendered within thirty days from the close of the proceedings. Some agreements call for a much shorter period, but those are infrequent and unrealistic and usually necessitate a waiver to permit the arbitrator adequate time for preparation of the award. (Zack, pp. 25-26)

Much of the material in Chapters X and XI is excerpted from "Discharge Arbitration and the Quantum of Proof" by Maurice C. Benewitz (Arbitration Journal, Vol. 28, No. 2, June 1973) and from Chapter IV, "Problems of Proof in the Arbitration Process: Report of the Chicago Area Tripartite Committee" in Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators (BNA, Inc. 1967)

XI. EVIDENCE

A. Legal Rules and Their Place

The courts, the arbitrators, and the parties are in general agreement that strict adherence to legal rules of evidence is neither necessary nor desirable in arbitration proceedings. It is, however, useful for the parties to have some understanding of those rules. The American Arbitration Association's Rule 28 proves for the arbitrator to be the judge of the relevancy and materiality of evidence. Most arbitrators admit whatever evidence will be helpful or is pertinent in making a decision. The purpose of the arbitration proceeding is to give both sides a full and fair hearing. Furthermore, one of the grounds for vacating an award in some jurisdictions is failure of the arbitrator to hear all relevant evidence.

1. Hearsay evidence is secondhand testimony; i.e., what someone told the witness had transpired or what the witness heard another person say. It is, therefore, not subject to cross-examination, and the otner party may be expected to object to its introduction as evidence.

A customary practice in arbitration is for hearsay evidence to be admitted "for what it is worth." The arbitrator's judgement and experience is usually relied on.

"Mere assertions or allegations are not proof, and unless substantiated by credible evidence, are not likely to sway the arbitrator."

Simply stated, the hearsay rule is that no statement made by a party not a party to the action is admissible for the purpose of establishing the truth of the matter asserted in the statement, unless it is or has been open to test by cross-examination or an opportunity therefor. It was agreed that strict adherence to the hearsay rule

as this rule has been developed by the courts is inadvisable in grievance arbitration. Even in the courts where cases are tried without a jury the rules against admissibility in hearsay evidence are substantially relaxed. The reasons for this apply with equal weight to the hearings before an arbitrator.

The arbitrator recognizing the hearsay aspect of evidence will know that it is entitled to less weight. The right of cross-examination also will act as a safeguard in this matter.

By and large evidence should not be excluded on the basis of the hearsay rule. Everything said or done by anyone concerned should be listened to and we should depend on the experience and good judgment of the arbitrator to separate the truth from untruth and to attach proper weight to what has been admitted. (NAA Procs.)

2. Credibility

A great number of times an arbitrator must decide a dispute on the basis of the credibility of the witness. Who does he believe was telling the truth? How does he do that? By looking at them. By listening to them. By seeing how they behave under cross-examination. By determining how consistent what they said under cross-examination was with direct examination. He is more likely to believe them if their cross-examination is consistent with their direct examination, because then they're behaving like normal truthful people. This is a subtle problem. Is a person with total recall not to be believed? Is the witness who is too glib fabricating testimony? In other words, the arbitrator deals with credibility a lot of the time.

(Benewitz, oral presentation)

Questions of credibility arise when conflicting testimony is offered. The arbitrator is then faced with determining which party is telling the truth. In part, his ability to do so is "dependent upon the observation of witnesses

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while testifying and particularly while under cross-examination." (Zack, p. 29) Expertise in this area develops with experience.

The question of how to determine credibility is so general as not to admit of a meaningful answer short of a treatise on the subject.

The following guides are listed as illustrative only:

a) Manner and demeanor of witness while testifying

b) Character and reputation of witness

c) Mental qualities of witness

d) Relative experience of witness

e) Emotional capacity of witness.

f) Opportunity of witness to observe.

g) Self-serving character of testimony

h) Interest or bias of witness

i) Failure to call on corroborative witnesses where available, as, for example, to support an alibi.

j) Inconsistency-contradiction-self-contradiction

k) Motivation of witness

l) Probability of testimony under all of the circumstances. (NAA Procs.)p.

3. Burden of proof

"Fair preponderance of the evidence," "Proof beyond the shadow of doubt," "Shifting burden" are all phrases used frequently in courts of law. While it is essential for the parties to prove their cases in arbitration, the legal requirements of burden of proof are not as strictly applied. These are not cases involving criminal prosecution or capital punishment. If there is any standard of proof in the arbitration field, it is "Convince the arbitrator." Either side may run the risk of non-persuasion irrespective of the absence of rigid formulas.

Despite the vagueness suggested by this concept, there are some standards carried over to arbitration from the common law which are accepted and provide guidelines for proceeding through the hearing. Thus the grieving party is assumed to have th burden except in disciplinary cases where the employer has the burden of proof. The party who challenges arbitrability has the burden as does the party seeking to establish a past practice in violation of the stated terms of the agreement. These burdens are many and man, indeed, shift but the subject matter involved, rather than who currently carries the burden, is most likely to determine the outcome of the case. (Zack, p. 30)

4. Relevance and Materiality

As in courts of law, counsel are likely to object to the admissibility of testimony or exhibits as being irrelevant and immaterial. The arbitrator must decide whether to accept or exclude certain evidence....Often more evidence is supplied by the parties than is necessary for him to resolve the dispute. But it is difficult to exclude material until it is heard and the arbitrator can distinguish whether or not it is relevant. Additionally, since arbitration involves parties who are in a continuing relationship, it is of value to that relationship that they 'get things off their chests.' The cathartic value of testifying or submitting an exhibit which the party believes to be important, may do more to restore tranquillity than the exclusion of such material. It is important to avoid the exclusion of something considered important by a party, particularly if that party loses the arbitration. Each individual must feel that he has been given his 'day in court.' Part of the arbitrator's function is to listen to such evidence although he may not attach any great significance to it....

The difficulty for the arbitrator in determining what is relevant at the outset of the case makes it unlikely that less, if any, effort will be made by him to exclude material on that ground early in the proceeding. To exclude evidence which at first appears irrelevant might be substantially detrimental to the party's presentation and to the arbitrator's comprehension of the case. Under U.S. and some state arbitration statutes, the refusal of the arbitrator to hear all relevant evidence may be ground for vacating an award. But as the case proceeds and the arbitrator becomes more familiar with the thrust of the presentation, he may then more likely discourage the continued introduction of irrelevant materials either through a plea to the offering party or by sustaining objections made by the other party. (Zack, p. 30)

In general, it is unwise to exclude evidence on grounds of irrelevance and immateriality. After the arbitrator understands the issues and has some idea as to what is relevant, he can discourage evidence which appears to him to be of no help in resolving the issue. Even then he must exercise care to see

that the parties have had a full and complete hearing. It is to be remembered that hearings, particularly in disciplinary matters, provide a catharsis for the parties. The fact that they are given a right to get statements off their chests will have a beneficial effect in itself. Care must be taken, however, that in permitting evidence to be introduced it relates to issues which are before the arbitrator and which had been the subject of discussion between the parties during the grievance procedure. (NAA Procs.)

5. Admissions

We are here concerned with admissions by the grievant or a duly authorized representative of the union or by a foreman or responsible official of the company. By an admission we mean a statement made prior to the arbitration hearing inconsistent with the claim or defense in the matter before the arbitrator. The statements being inconsistent, one or the other must be incorrect and a doubt is then thrown on the assertion being made at the hearing. In the absence of an explanation of the inconsistent statement, the statement asserted at the hearing may be discredited.

Most admissions of this character are made during the grievance procedure. The problem which confronts the arbitrator is to make rulings which will not jeopardize the grievance procedures. The great bulk of grievances are disposed of by the parties prior to arbitration. We need not underscore the fact that in order that the grievance procedure be an effective vehicel for disposing of grievances, the parties and their representatives must have confidence they can speak freely and candidly with each other without fear of reprisal and without fear of having cases of significance prejudiced in the arbitration hearing by their statements. In a particular case the arbitrator may properly admit statements made during the grievance procedure, but the effect may be to freeze the grievance procedure thereafter and to defeat an objective of sound arbitration procedure, the preservation and enhancement of the grievance procedure.

...offers of compromise should be excluded. The general rule developed in the courts is that an offer to compromise a claim is not evidence of an admission that the claim is valid or of a dubious character. As a matter of experience, offers of this character are made to avoid time-consuming, irksome, or expensive arbitration procedures and may not signify in any way consciousness of liability. Moreover, as a matter of sound labor management policy, offers of peace should be encouraged. If a party offers evidence relating to such a compromise, it can only be for the purpose of persuading the arbitrator that the offer is in itself an implied admission of liability or of weakness in the claim. Since offers to settle are made for reasons having nothing to do with the question of liability or of the ability to prove the claim, the arbitrator should reject the offer of such evidence. The admission of such evidence will be prejudicial to the grievance procedure and to the settlement of grievances and may do untold harm to the parties' relationships. (NAA Procs. P.

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6. Earlier Events

(Admissibility of events transpiring in earlier processing of the case)

By the time a case reaches arbitration, it has progressed through several steps where, presumably, there have been some efforts to settle the dispute. If one party has acknowledged its willingness to resolve the case on less favorable grounds than it is endeavoring to achieve in arbitration, it is a temptation for the other side to bring that offer into evidence. Arbitrators bar the introduction of such offers on the theory that their admission in arbitration would frustrate offers of settlement in future cases and destroy, rather than bolster, the sanctity of the grievance procedure as the preferred locus of dispute resolution. Furthermore, even if introduced, it is difficult to ascertain whether the offer is truly an acknowledgement of weakness or wrong position since the effort to settle might have been unrelated to the merits of the case or involve exchanges of other benefits that are unknown to the arbitrator. (Zack, p. 30)

a) Statements Made in Grievance Meetings

Related to offers of compromise is the question of whether statements made by witnesses in the earlier processing of the grievance should be admitted into evidence at the arbitration hearing. Here again the arbitrator is faced with a dilemma: the clearest possible view of the facts as enlightened by all possible relevant evidence, versus preservation of the privacy and privilege of the grievance procedure to encourage the earliest possible settlement of grievances. Although most arbitrators tend to exclude statements made in prior meetings when objected to, they are unlikely to raise an objection on admissibility themselves.

An exception to the rule of exclusion is likely to be made in discipline cases. Arbitrators will often admit statements made by the grievant in a grievance meeting or a statement made in his presence without his contradiction.

Most parties keep records of grievance meetings. These records are often admitted into evidence without objection from the other side. But when an objection is raised, the arbitrator will generally exclude such minutes. He will admit them when prepared jointly or if prepared by one side and then distributed to and commented on by the other party. Zack, pp. 30-31)

7. Parole evidence

A Definition - what is parole evidence? Parole evidence is oral or even written evidence meant to elucidate the intent of the parties in adopting the given contract. It would be a

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total mistake not to expect parole evidence since in almost every arbitration both sides try to introduce parole evidence, and it is, in almost every case, totally inappropriate. (Benewitz, oral presentation)

Many collective bargaining agreements specifically prohibit the arbitrator from adding to, detracting from, or otherwise modifying the terms of the parties' agreement. Yet, there are numerous grievances arising out of questions of the meaning of a provision. One party says that the language is clear, while the other contends that a contrary meaning was intended when the contract was drawn. The party relying on the contract as written may object to the introduction of any background data on the ground that the parole evidence rule bars such testimony on what happened at the time of negotiations. Arbitrators are not likely to rely heavily on the parole evidence rule to exclude evidence or testimony. This is because the collective bargaining agreement is accepted as a flexible and living document subject to constant use, application and even modification by the parties. It may often change in use and may very well differ in application from its original intent and the prevailing circumstances at the time the contract was signed. It is adapted to the needs of the parties throughout the term of the agreement. (Zack, p. 31)

b) Use of parole evidence

The parties hired the arbitrator to interpret a piece of language. If he can't understand it, he must take parole evidence to find out what it was each of the parties thought the agreement was when he accepted it. When two parties put in parole evidence as to what a piece of language means, one says it means one thing and the other says it means the opposite.

The arbitrator takes parole evidence when either the language of the contract is unclear or when there are two or more pieces of a language in the contract. In that case the arbitrator <u>has</u> to take parole evidence and make the best sense he can of it and try to find out what the language means. But he should not take parole evidence when, in his

opinion, he understands what that language means.

If the circumstances involved have happened before and the union didn't grieve, or if the union grieved but did not pursue the matter to arbitration, it provides the employer with a very powerful defense because it is considered an admission by the union that the employer's action was correct.

For example, it may be that the union tried to get in the last negotiation a contract clause which specifically outlawed what occurred in the case at hand and didn't get it, and the language remained the same. How can that be proved? Not out of memory, but by showing contemporaneous notes or, even better, the union demands, and the fact that what they asked for, they didn't get. Now what does that mean? If they didn't get what they are contending in the case at hand, the greatest defense an employer can offer is that an arbitrator may not give to a union in arbitration something the union was unable to win by negotiation.

c) Admissibility of parole evidence

Generally speaking, when we use the term parole evidence, we use it in relation to the interpretation or application of an agreement and for the purpose of determining the meaning of words in the agreement. The primary source of interpretation of an agreement, of course, is the agreement itself, but parole evidence refers to everything in the parties' conduct or statements which may throw light on the meaning of the words in question. (NAA P. 5)

d) When is Parole Evidence Admissible to Interpret or Explain Contract Provisions?

The general rule is that where a contract provision is clear and unambiguous, parole evidence should not be entertained to vary its terms. As a practical matter, in almost every case where parole evidence is offered of this charac-

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ter, the party offering it contends that the language is ambiguous. The arbitrator is hardly in a position in the course of the hearing to make the determination that the language is free from ambiguity and so as a practical matter the evidence is offered and generally received. In general, the parole evidence offered falls into two categories: proof going to the collective bargaining history of the agreement, including the negotiations which preceded the agreement; and what we generally categorize as "past practice", or how the parties have by their conduct interpreted or applied the agreement. As to the collective bargaining history, no problem arises as to the introduction of the prior agreements between the parties where, in fact, an ambiguity exists. Prior agreements may be a valuable source of information in resolving ambiguities. More serious problems arise with relation to admissibility of evidence in connection with the negotiation process. Drafts of collective bargaining proposals exchanged by the parties present no problem. Proof of oral statements made at bargaining table, however, usually generates a substantial amount of testimony and seldom is of value. Nevertheless, there is no basis upon which such evidence can be excluded, assuming the issue of ambiguity exists, so long as the statements were made in the presence of both parties.

The other area of parole evidence which is frequently offered in arbitration proceedings is evidence of past practice of the parties, by which we mean the parties' conduct in the application of the agreement. Item 4 of the Common Agenda Items raises the question as to whether proof of past practice should satisfy certain special standards. This question raises a substantive issue more than an issue of evidence. It goes to the question as to when an arbitrator shall determine that a past practice exists. It is agreed that generally arbitrators are warranted in holding that past practice does not exist unless certain standards are satisfied. The subject of these standards has been considered at length at previous National Academy meetings. So long as there is a claim of ambiguity the arbitrator should listen to whatever evidence is offered on past practice. (NAA Procs. p. 6)

8. Circumstantial Evidence

Circumstantial evidence is all evidence which raises an inference with respect to some other fact other than testimony offered to evidence the truth of the matter asserted. The latter is referred to as testimonial evidence, sometimes as direct evidence. For example, an employee is discharged for injuring another employee by throwing a hammer at him. The discharged employee denies this charge. Evidence is offered by a foreman that he saw the aggrieved throw the hammer at the fellow employee. This is testimonial evidence. Evidence is also offered that the hammer was part of the standard tools in the possession of the aggrieved, that his hammer was missing from the tool box, and that the hammer in question has the initials of the aggrieved on it.

The latter testimony is circumstantial in character. Similarly, fingerprints of the aggrieved on the hammer would be circumstantial in character.

Circumstantial evidence may have as much probative value as testimonial evidence. It should be received and it should be given such weight as it may deserve, considered in context with all other evidence offered. The principal difference between testimonial evidence and circumstantial evidence relates to the approach to assaying the evidence. The principal problem with testimonial evidence is making a determination as to the credibility of the witness. This involves an evaluation of the person, giving weight to psychological factors, etc. With circumstantial evidence, what is involved generally is the inductive process. The person offering the evidence desires a certain inference to be drawn from an evidential fact. The opponent may attempt to explain away this fact by pointing out some other and more plausible inference, or the opponent may deny that the claimed evidential fact is a fact or may set up a rival fact to overcome the evidential fact involved. Both testimonial evidence and circumstantial evidence may be scattered through a case involving a fact issue. Both kinds of evidence have their own points of strength and weakness. The principal problem is the weight to be attached to them. (NAA Procs. p.7)

As in courts of law, so too in arbitration proceedings, greater weight is generally accredited to direct evidence than to evidence which is merely circumstantial. Although direct evidence is, of course, preferred, there is less reluctance in arbitration than in the courts to rely on circumstantial evidence. Arbitration decisions do not carry the consequences of court judgments. Quite frequently, circumstantial evidence is offered with the intent of convincing an arbitrator that a certain event did take place, although witnesses are lacking. (Zack, p. 31)

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9. Remanding for procedural inadequacy

By the time a case coms to arbitration, it has usually survived a careful scrutiny of both parties in the various steps of the grievance procedure. Sometimes, however, the parties try to take short cuts to bring a pressing case to arbitration more promptly. This may occur to expedite a discharge grievance or to double up cases when a hearing date has already been scheduled. It might mean that the contractual prerequisites for appeal to arbitration have not been fully met. In most cases such bypassing of a step occurs by mutual agreement. In other cases, however, an objection might be raised that there was no such waiver and the provisions of the grievance procedure were not fully complied with. In such circumstances the arbitrator will have to determine whether to remand the case back to the grievance procedure. In cases where the error was one of form, such as the failure to get a written rather than oral reply at one step, the arbitrator is likely to decide that the rule of de minimis applies and that nothing will be gained, except delay, by remanding. But in cases where the error was more substantive, such as failure to receive the results of an employer's investigation, or by-passing of a step, he might be inclined to return the matter to the parties and defer hearing the case. In general, such remand would be ordered only where there is hope that further discussion between the parties will be fruitful either in resolving the dispute or narrowing the issues. (Zack, p. 31)

10. Surprise

Related to the remand issue is the question of what to do when new material is offered at the arbitration hearing which was previouslu unknown to one of the parties. The arbitrator is anxious to have all pertinent testimony available prior to preparing his decision. The failure of one of the parties to present important evidence during the earlier steps of the grievance procedure may raise questions of good faith on the part of the offering party. Generally such evidence is admitted if relevant and important and if there is valid justification for its belated presentation.

If the surprise is genuine and concerns crucial evidence, the arbitrator might refer the case back to the parties for further negotiation in the hope of achieving a settlement. He might recess the proceedings for such time as he deems necessary for the party claiming surprise to investigate the matter and prepare evidence in response thereto.

The same result would be less likely to occur when the element of surprise is raised in response to a new argument being offered by one of the parties in closing oral argument. The arbitrator might not agree with the practice of withholding good arguments from discussion in grievance meetings, particularly where he feels the party raising such argument

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deliberately withheld it in order to lure the other party into appealing to, and then losing at, arbitration. But it is unlikely that he would remand such a case to the parties, since nothing is gained by so doing. More likely he would provide the objecting party an opportunity to develop a response thereto through submission of a posthearing brief, when only one such brief per party was arranged, it is unlikely that he would permit a reply brief to be filed unless both agreed upon such. (Zack, pp. 31-32)

11. New evidence

If new evidence comes to light after the hearings have been closed but before the award is rendered, the arbitrator might grant a request that the hearings be reopened if he feels the evidence is sufficiently material, if it is not cumulative beyond what is already received, or if it could not have been timely located with reasonable diligence. Such reopening might be held to require the joint agreement of the parties. If the new evidence comes to light after the arbitrator issues his award, he is functus officio and powerless to reopen the case without the agreement of the parties.

12. Subpoena power

In some cases it will be impossible for one of the parties to convince the other party to produce a particular witness or specific evidence. In such cases a request will be made of the arbitrator for a subpoena. The subpoena power of the arbitrator depends upon the state in which he is functioning. In some states, an attorney for either party, as an officer of the court, has the power to issue a subpoena. In practice it is not usually necessary for an arbitrator to issue a subpoena since his warning of a possible adverse inference concerning the non-production of witnesses or evidence is usually sufficient to produce them. But where a subpoena is necessary, it is up to the party contending for the issuance of the subpoena to convince the arbitrator of the need for the testimony or the evidence sought, his authority to demand it, and of the authority of the arbitrator to issue this process. (Zack, p. 32)

13. Minutes as evidence

Minutes may be introduced as evidence if neither side objects.

Offers to settle, which might be contained in minutes, should be

deleted.

14. Adverse inferences

Since there is no Fifth Amendment principle in arbitration, if

one party does not present a witness the other party has the

right to ask that an adverse inference be drawn from the fact that the witness was not presented. As a result, in all discipline arbitration the grievant is always put on the stand at some point or other. There is always a hazard when a grievant takes the stand in a discipline case, because it is often in cross-examination of the grievant that his case is most severely tested. But if he does not appear, he will surely lose, so they have at least some chance of winning if they do put him on and almost no chance of winning if they don't put him on, and that's why he's always put on. (Benewitz, oral presentation)

15. Opinion evidence (including expert testimony)

As used in the law of evidence, an opinion is inference from data observed or made available to the witness. The opinion rule followed by many courts is that when the data which is used as a basis for the opinion can be exactly and fully reproduced by the witness so that the jury can equally draw the inference from them, the witness' opinion will be excluded. This rule has been severely criticized by leading scholars for the reason that it is only very rarely that data can be exactly and fully reproduced in words. But, in more practical terms, there is no harm in letting a witness offer his inference except for the time that it may take to do so. Quibbling about whether the opinion should be received will generally waste more time than receiving the opinion. The fact is that cross-examination affords ample protection.

There is one area in which an arbitrator can justifiably refuse to receive opinion evidence. It occurs where the issue before the arbitrator is one of interpretation of an agreement and the opinion evidence offered goes to the witness' opinion as to what the contract means. But here again little harm will result from receiving the evidence. The arbitrator is not bound to give it any weight.

Expert testimony should, of course, be received. There was general agreement that the strict court rules for establishing the qualification of the expert need not be insisted upon, although, as a practical matter most parties offering an expert witness will take pains to lay a detailed foundation for claiming that he is an expert. In weighing the testimony of an expert, attention should be given especially to the opportunity of the expert to have access to data which would give him a basis for expressing an opinion. Obviously an expert who testifies on the basis of what someone else has told him, in other words, on the

basis of hearsay and not personal knowledge, is not entitled to have as much weight given to this testimony. Again primary reliance must be placed by the arbitrator on cross examination. (NAA Proc. P. 5)

16. Discharge

In the area of discipline and particularly discharge, arbitration and the judicial process converge. Approximately one-quarter of all cases involve a review of penalties imposed upon an employee by management for some infraction of plant rul or criminal behavior. Most contract provide that discharge shall be for 'cause,' 'just cause,' "proper cause,' or some similar standard, which Arbitrator Joseph D. McGoldrick has defined to "exclude discharge for mere whim or caprice.. (reasons include)... the right to discharge for theft, repeated absence or lateness, destruction of company property, brawling, and the like." (Benewitz in Arb. J. 1/28, 2; 6/73)

XII. WHAT ARBITRATORS LOOK FOR

A. Arbitrary, Capricious or Discriminatory Action

One important determination an arbitrator must make is whether or not an action was arbitrary, capricious or discriminatory.

An arbitrary act is an action without a reason or in disregard of those criteria which the contract or the relationship has established over time; it is an act performed in deliberate disregard of the criteria, because that is the difference between the terms arbitrary and capricious to a large degree. An action which is capricious may also be without reason, but it is also ordinarily without thought. That is, it is not deliberate. It is simply done. The word arbitrary describes the deliberate act, the conscious disregard for one reason or another of criteria which everybody understands.

The term capricious is often used to denote a thoughtless act which denies people certain rights in certain circumstances and in other circumstances gives them the same rights. That is, a capricious act is one which has not been weighed and considered.

A discriminatory act may be defined as a deliberate act of treating people in the same circumstances in different ways for an unacceptable reason. Common forms of discrimination include discrimination on the basis of race, color, creed or sex -- all unacceptable reasons for treating people differently, but there are other unacceptable reasons as well. Discrimination exists anytime that people in the same circumstances are treated differently with malice of forethought and deliberate intent. (Benewitz, oral presentation)

(XII. WHAT ARBITRATORS LOOK FOR)

B. Weight of Evidence

Arbitrators will look to see whether the language of the contract was obeyed, whether acts were arbitrary or capricious or discriminatory and whether the parties in a dispute can offer proof of the information they present as fact. It is much easier to allege things than to prove them and proof is necessary. The arbitrator cannot go on common knowledge. If he is professional and if he takes his job seriously, he will go only on the record which is made before him. The parties to the dispute are entitled to enter testimony and evidence meant to convince him of the logic of their positions. What are these types of testimony and evidence by which the arbitrator may be convinced that the allegations made about a case in the opening statements are true or false? What is the weightiest kind of evidence one can put before an arbitrator? The most convincing evidence is a document kept in the normal and ordinary course of business and created for a reason entirely separate from the arbitration or the grievance which has arisen. Documents do not lie and are not subject to easy cross-examination confusion. Witnesses, of course, are important, too, and very often, of course, a document cannot be entered except through the testimony of who can explain what the document was, how it was developed and why it was developed. What the arbitrator is looking for is an orderly presentation of supporting data to indicate to him that what you are alleging actually took place and why. (Benewitz, oral presentation)

(XII. WHAT ARBITRATORS LOOK FOR)

The private judicial process of arbitration affects the employability of those judged and further affects fundamental job property rights without the opportunity of more than the most limited judicial review.

What standards of proof have been used or suggested? The various standards were well summarized by Arbitrator E. E. Hale in the matter of Howell Refining Co. He wrote as follows:

"... Though in arbitration proceedings, the legal doctrine of 'burden of proof' is not applied as strictly as in legal proceedings before a court, yet because of the seriousness of the penalty of discharge, the burden generally is held to be on the employer to prove the employee's guilt or wrongdoing..."

Arbitrators are not agreed as to degree or quantum of proof of an employee's wrongdoing, which an employer is required to provide in a discharge case. Some, like Arbitrator Mitchell M. Shipman, require proof "beyong a reasonable doubt." Other arbitrators require a lesser degree of proof such as "the preponderance of the evidence"..., or "clear andconvincing evidence"... or "evidence to convince a reasonable mind of guilt."

The statement that the burden of proof, whatever the quantum, is upon the employer in discharge cases has a precise meaning. It is a well-known legal principle that he who affirms must prove. Where consideration of the whole evidence leaves the matter in equipoise, the affirmer must fail.

Black's Law Dictionary, 4th Ed. defines the various degrees of proof mentioned above as follows:

Beyond a Reasonable Doubt: In evidence means fully satisfied, entirely convinced, satisfied to a moral certainty ... and phrase is the equivalent of the words clear, precise and indubitable.

Fair Preponderance: Evidence sufficient to create in the minds of the triers of fact the conviction that the party upon whom is the burden has established its case... Such a superiority of evidence on one side that the fact of its outweighing the evidence on the other side can be perceived if the whole evidence is fairly considered...

Clear and Convincing Proof: Generally, this phrase and its numerous variations mean proof beyond a reasonable, i.e., well-founded doubt.

Some cases give a less rigorous, but somewhat uncertain meaning, viz. more than a preponderance but less than is required in a criminal case." (Benewitz, Arb. J.)

C. Standards on Interpreting Contract Language

What standards are used by arbitrators in interpreting contract language? Many cases turn on what a piece of language means. Sometimes those standards are laid out in the contract and are clear and unequivocal.

When a contract says that a person shall not be disciplined except for just cause, that is not a piece of general language. "Just cause" means particular things to arbitrators, and the same things, to any professional arbitrator. The first question he asks is: What is the alleged violation? Did the grievant have reason to know that this act, if it were done, is improper? That is, is the rule or regulation allegedly violated, published and known, open and notorious? Third, did the grievant know, or should he have known if he didn't know, what the presumed penalties would or could be for violation?

Unless it is clear that the parties are using a term as a work of art, the arbitrator or any constructor of contract language will always give to that language the normal dictionary meaning of the term. (Benewitz, oral presentation)

1. Analyzing the Evidence

When the arbitrator has amassed all the exhibits, his notes, and any transcript and/or briefs that have been supplied, he is ready to begin the preparation of the award.

(XII. WHAT ARBITRATORS LOOK FOR)

This material is studied in the light of the parties' agreement, their past practice, arbitration awards, pertinent laws and regulations, and the like. The arbitrator functions alone unless he is a member of a tripartite panel, consulting no one for advice or further information unless specifically authorized to do so by the parties. (Zack, p. 33)

2. Ambiguity

It is the uncertainty of the contract language which gives rise to many grievances, and it is that uncertainty which the arbitrator, in the last analysis, must resolve. Clear language is generally applied as written, but often apparently "clear" language is subject to conflicting interpretations. In cases of ambiguity the arbitrator must endeavor to discover what the parties intended and then make his award in conformity with that intent. Sometimes when there was no meeting of the minds the arbitrator may so interpret the language as to be in accord with other provisions of the agreement or with what he believes to be the most practical interpretation of the disputed language. Nonetheless, despite the latitude which the arbitrator might have in ascribing realistic meaning to the ambiguous language of the parties' agreement, he may not alter it. That is a matter for the parties themselves in negotiating their agreement and may not be usurped by the arbitrator.

In shedding light on ambiguous language the arbitrator may rely upon certain well-established legal concepts. Thus the tradition of "inclusio unius est exclusio alterius" is generally relied upon to exclude unspecified items when a number of similar or comparable items are listed. Likewise specific contract language is held to prevail over more general language, and subsequently adopted language is held to prevail over earlier language. Words are given their normal usage and efforts are made to construe the agreement as a whole, avoiding harsh, absurd or nonsensical results.

Thus, testimony as to what transpired in the parties' contract negotiations often helps to resolve ambiguities. It may be demonstrated by minutes of negotiating sessions, exhibits listing contract demands, or oral testimony. Unsuccessful efforts to include certain language in an agreement will almost uniformly preclude the arbitrator from reading that same language into the contract.

The parties own practice as well as that prevailing among comparable employers, may be germane in resolving ambiguities in contract language. Prior settlement of disputes over similar issues may also enlighten the arbitrator in this respect. (Zack, p. 34)

(XII. WHAT ARBITRATORS LOOK FOR)

D. Arbitration Precedents

Unlike judges in courts of law, arbitrators have very limited opportunity for relying on precedent in the making of their decisions. As a practical matter the only binding precedents in the analogous sense are the arbitration awards rendered in disputes between these same parties, under the same agreement. And, of course, such decisions are distinguishable in many instances and need not be followed if the arbitrator in the later case disagrees with the views of the earlier arbitrator. It is desirable for the continuity of the parties' relationship and to deter the taking of spurious or repetitive claims, for arbitrators to maintain consistency with one another. But there is neither contractual nor legal requirement that they do so. There is also some concern that strict adherence to procedure will increase the legalistic restraints already creeping into arbitration.

Arbitrators are often referred to other cases between the parties which arose under prior collective bargaining agreements. The extent to which the arbitrator in the current case may feel bound by decisions under prior agreements depends on what has transpired in the meantime. If the contract language interpreted by the prior arbitrator has remained unchanged, the prior award would be more persuasive than where a change had been negotiated in the disputed language during the intervening period. Even under such circumstances, it is possible that the earlier decision contained references to unchanged language or set forth dicta that have provided the basis for the parties' conduct in the intervening period.

Very often arbitrators are referred to cases decided by other arbitrators in disputes between the employer and other employee organizations, the organization and other employers, or between two totally different parties. These decisions are not binding on the arbitrator, unless perhpas one of them were his, in which case personal consistency would be of importance. They are not usually introduced for purposes of binding the arbitrator, but rather to persuade him that the reasoning and decisions adopted by his brethren under similar circumstances should be followed in the instant case. At times, an arbitrator will research the published cases independently to learn how others have treated similar problems. In this respect the published awards have become a sort of substantive law of employee relations. (Zack, p. 34)

E. Past Practice

The employee-employer relationship does not operate in a strictly legalistic format. Rather, it is an outgrowth of a combination of the written word and the actions of the

parties under the aegis of the agreement. The practice of the parties may be as much a part of their agreement as is the written word.

Arbitrators recognize past practice as an essential component to the parties' relationship and attach varying weight to it when attempting to ascertain the true intent of the contract or the manner in which the parties have adapted the contract to the practicalities of the working place. The evidence of past practice which has not been circumscribed or limited by the language of subsequent agreements is bound to carry great weight in determining the intent of the parties. Past practice unchanged by contract negotiations is carried forward as one of the terms of employment and becomes in a sense a part of the contract.

In some cases of consistent practice in contradiction of the written agreement, the practice will be viewed by the arbitrator as a reshaping or amendment of the contract by mutual consent. Thus a clear and ongoing, consistent practice of the parties, in direct violation of the contract may, in effect, constitute a rewriting of the contract by the parties themselves. The value of such contract language vis-a-vis past practice may be crucial to the arbitrator's decision. In the public sector this problem is made very real by language protecting the employees' prior working conditions. These 'maintenance of standards' clauses bring the prior practices into the current agreement very vivdly. Some employers seek to offset this language by substituting wording at the other extreme, limiting grievances to the 'specified terms and conditions of the parties' agreement.' The arbitrator often may have to weigh the competing language against past practice to determine which prevails. (Zack, p. 35)

F. Remedy

The arbitrator, bound by the terms of the parties' submission, may only provide a remedy when he is empowered by the parties to do so. In providing a remedy he must often come to a decision as to the appropriate measure of damages under the circumstances. In fashioning a remedy in arbitration the arbitrator is also limited in authority by the remedy sought by the grievant. If the grievant has been totally wronged, the arbitrator seeks to make him whole for the loss occasioned by the other party's violation of the parties' agreement. He is not to award a punitive remedy or extra damages unless the agreement so provides. In making the aggrieved party whole, the arbitrator has a choice of approaches depending upon the circumstances of the case.

G. The Award

Once the arbitrator has thought out his decision and the supporting reasoning therefore, he turns to the actual preparation of the award.

(XII. WHAT ARBITRATORS LOOK FOR)

The award is prepared primarily for the parties involved in the particular dispute but it has impact beyond those individuals for the life of the parties' agreement and beyond. The award and its reasoning may also have some value to other parties involved, it is not unusual for such awards to be made available to others through publication by the reporting services or through direct contact. Thus the award, to serve its educational purpose, must be a complete account with full exposition of all that has occurred in the case. It is the arbitrator's responsibility to include all material relevant to his decision in writing in the award.

The award generally begins with a statement listing the parties to the dispute, the authority of the arbitrator and the statement of the issue.

Thereafter, the arbitrator sets forth a statement of the facts as he sifts through the maze of offered testimony, including statements of conflicting facts if they are present in the case. The facts are frequently recited in chronological order, terminating with the filing and processing of the instant grievance.

The relevant contract citations are then set forth by the reference of those reading the award and are followed by a statement of the reasoning used by the arbitrator in reaching his decision. This discussion is the core of the award, for here the arbitrator states why he reached the conclusion he did. It provides an explanation of the arbitrator's course of conduct in disposing of the grievance either through the ordered remedy or the dismissal of the grievance. The explanation might also contain recommendations for the parties' future conduct to avoid similar confrontation in the future.

The arbitrator begins by focusing attention on the main issues--perhaps pointing out the irrelevancy or inconsequentiality of other issues, giving the reasons for his conclusions, and responding to the arguments raised by the losing party. Once these issues are disposed of, the case is resolved. The arbitrator must be clear in his use of language so that there is no misunderstanding of the content of the award. Yet it is also desirable that the award be brief and succinct in order that it might be easily read and understood by its readers.

The conclusion of the award is the arbitrator's formal answer to the question submitted to him by the parties. If he fails to answer the precise question submitted to him, the award is in jeopardy. It may be unenforceable in the courts. More importantly, the parties may be denied the guidance and findings which they requested of the arbitrator. Thus a carefully written decision answering the question submitted by the parties is acutely important. (Zack, p. 36)

(XII. WHAT ARBITRATORS LOOK FOR)

The deadline for issuance of the award may be established by the arbitrator, the parties, the designating agency, the law, or some governmental authority. In general, the arbitrator endeavors to issue awards as soon as his schedule will permit in order to provide the parties with the award they seek and to close out his files. As noted above, in some contracts the parties have set forth a deadline for the issuance of the award by which the arbitrator is bound unless he obtains agreement on an extension of the time for making the award.

In cases which emanate from designating agencies, the parties subscribe to the rules of such organization. These rules usually require, as in the case of the American Arbitration Association, the issuance of awards within thirty days of whichever occurs the latest: 1) conclusion of the hearing, 2) receipt of the transcript, or 3) receipt of post-hearing briefs.

The award is signed by the arbitrator, or the three man panel if appropriate, and includes the date of its issuance. In some jurisdictions it must also be notrarized. (Zack, p. 36)

XIII. AWARDS

In most states an arbitration award can be docketed as a judgment within a certain period of time on a summary procedure. It also can be set aside within a certain period of time on a summary procedure.

But usually the only grounds for setting aside would be fraud or if an arbitrator went beyond the submission or if he failed to listen to relevant evidence.

A. Functus Officio

Once the arbitrator has issued his award, his function is terminated. His jurisdiction over the matter is ended, and he is as a stranger to the case. This prohibits his receiving subsequent arguments, reopening the hearings, or amending his award. Any further involvement by the arbitrator, such as responding to a request for clarification, requires the agreement of the parties to re-cloak him with responsibility for the case for the limited purpose intended by the parties. (Zack, p. 37)

B. Rejection-Acceptance

Arbitration is generally assumed to be final and binding on the parties so that any findings of the arbitrator are conclusive and the directions for compliance set forth in his award must be followed by the parties.

But there are portions of the award which may be made in the form of recommendations by the arbitrator, either in the decision portion or as dicta in the arbitrator's discussion. These recommendations are obviously subject to acceptance or rejection by the parties as they see fit.

As noted earlier, there are situations in which arbitration is only advisory, particularly in new collective bargaining relationships in the public sector. The recommendations in such situations are merely that and are not binding on the employer or the employee organization. As a practical matter, for the employer to ward off the progression to arbitration, compliance with the recommendations of the arbitrator is essential. For the employee organization, compliance is the only practical way to prevent the employer from retrenching from agreement to even advisory arbitration.

(XIII. AWARDS)

> Regardless of whether the award is advisory or binding, there is no question that some arbitrators' decisions leave the parties dissatisfied. They are, of course, free to meet and discuss the results thereof to make them more mutually palatable. Failure to reach such accommodation on a variance would require the implementation of the award as rendered. (Zack, p. 37)

C. See also II Judicial Review of Arbitration, B2., p. 17 of this manual.

ARBITRATION CASES - PROBABLE SOLUTIONS

An arbitrator is an interpreter of contract language and trier of facts who brings his informed judgment to resolve disputes arising out of collective bargaining agreements. His authority is derived from these agreements and is further limited to the issue jointly submitted to him in a given situation.

For instructional purposes we have defined a specific issue for each case. In addition assumptions have been made and facts expanded upon, without being altered, to provide probable solutions. An arbitrator in the real world may not take this liberty; we are required to do so here because of the abbreviated nature of these cases.

The proposed solutions are not the only possible solutions. They have been prepared by Professor David R. Bloodsworth, Assistant Director, Labor Relations and Research Center, University of Massachusetts, as a guide.

BYRON HILLS BOARD OF EDUCATION

and

BYRON HILLS TEACHERS ASSOCIATION

Applicable Contract Provisions

Article V, Section 7A, 1-4

Section 7 - Promotions

A. Promotional Positions

1. Promotional positions are defined as follows: positions which pay a special salary differential, which involve in part or in full the performance of supervisory or administrative duties, and which include the positions of superintendent, deputy superintendent, assistant superintendent, associate to the assistant superintendent, director, supervisor, principal, vice-principal, coordinator attached to the central office staff, department chairman, head guidance counselor, and supervisory assistant.

2. The notice of any vacancy shall clearly state all qualifications, descriptions, requirements, duties, and any other pertinent information respecting the vacancy. It shall also include the salary to be paid in such a position. Each such notice shall be posted on the bulletin board set aside for use by the Union.

3. All notices of vacancies shall be posted and otherwise publicized no less than one (1) month prior to the time at which the receiving of applications for said vacancies is closed.

4. The right to apply and compete for any and all promotional positions shall be open to all employees who meet the qualifications and requirements of any or all of the respective positions to be filled.

ARTICLE III

GRIEVANCE PROCEDURE

A. Definitions

1. A "grievance" is a claim by a teacher or the Association based upon the interpretation, application, or violation of this Agreement, policies or administrative decisions affecting a teacher or a group of teachers.

2. An "aggrieved person" is the person or persons making the claim.

3. A "party in interest" is the person or persons making the claim and any person who might be required to take action or against whom action might be taken in order to resolve the claim.

B. Purpose

1. The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the problems which may from time to time arise affecting teachers. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure.

C. Procedure

1. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

2. In the event a grievance is filed at such time that it cannot be processed through all the steps in this grievance procedure by the end of the school year and, if left unresolved until the beginning of the following school year, could result in irreparable harm to a party in interest, the time limits set forth herein shall be reduced so that the grievance procedure may be exhausted prior to the end of the school year or as soon thereafter as is practicable.

3. Level One

A teacher with a grievance shall first discuss it with his principal or immediate superior, either directly or through the Association's designated representative, with the objective of resolving the matter informally.

Grievance Procedure

4. Level Two

If the aggrieved person is not satisfied with the disposition of his grievance at Level One, or if no decision has been rendered within five (5) school days after presentation of the grievance, he may file the grievance in writing with the Chairman of the Association's Committee on Professional Rights and Responsibilities (hereinafter referred to as the "PR&R Committee") within five (5) school days after the decision at Level One or ten (10) school days after the grievance was presented, whichever is sooner. Within five (5) school days after receiving the written grievance, the Chairman of the PR&R Committee shall refer it to the superintendent of schools.

5. Level Three

(a) If the aggrieved person is not satisfied with the disposition of his grievance at Level Two, or if no decision has been rendered within ten (10) school days after the grievance was delivered to the superintendent, he may, within five (5) school days after a decision by the superintendent or fifteen (15) school days after the grievance was delivered to the superintendent, whichever is sooner, request in writing that the Chairman of the PR&R Committee submit his grievance to arbitration. If the PR&R Committee determines that the grievance is meritorious, it may submit the grievance to arbitration within fifteen (15) school days after receipt of a request by the aggrieved person.

(b) Within ten (10) school days after such written notice of submission to arbitration, the Board and the PR&R Committee shall attempt to agree upon a mutually acceptable arbitrator and shall obtain a commitment from said arbitrator to serve. If the parties are unable to agree upon an arbitrator or to obtain such a commitment within the specified period, a request for a list of arbitrators may be made to the American Arbitration Association by either party. The parties shall then be bound by the rules and procedures of the American Arbitration Association in the selection of an arbitrator.

(c) The arbitrator so selected shall confer with the representatives of the Board and the PR&R Committee and hold hearings promptly and shall issue his decision not later than twenty (20) days from the date of the close of the hearings or, if oral hearings have been waived, then from the date the final statements and proofs on the issues are submitted to him. The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning and conclusions on the issues submitted. The arbitrator shall be without power or authority to make any decision which requires the commission of an act prohibited

by law or which is violative of the terms of this Agreement. The decision of the arbitrator shall be submitted to the Board and the Association and shall be final and binding on the parties.

(d) The costs for the services of the arbitrator, including per diem expenses, if any, and actual and necessary travel, subsistence expenses and the cost of the hearing room shall be borne equally by the Board and the Association. Any other expenses incurred shall be paid by the party incurring same.

D. Rights of Teachers to Representation

1. Any aggrieved person may be represented at all stages of the grievance procedure by himself, or, at his option, by a representative selected or approved by the Association. When a teacher is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of the grievance procedure.

2. No reprisals of any kind shall be taken by the Board or by any member of the administration against any party in interest, any representative, any member of the PR&R Committee or the Association, or any other participant in the grievance procedure by reason of such participation.

E. Miscellaneous

1. If, in the judgment of the PR&R Committee, a grievance affects a group or class of teachers, the PR&R Committee may submit such grievance in writing to the superintendent directly and the processing of such grievance shall be commenced at Level Two. The PR&R Committee may process such a grievance through all levels of the grievance procedure even though the aggrieved person does not wish to do so.

2. Decisions rendered at Level One which are unsatisfactory to the aggrieved person and all decisions rendered at Levels Two and Three of the grievance procedure shall be in writing setting forth the decision and the reasons therefore and shall be transmitted promptly to all parties in interest and to the Chairman of the PR&R Committee. Decisions rendered at Level Three shall be in accordance with the procedures set forth in Section C, paragraph 5 (c) of this ARTICLE.

3. All documents, communications, and records dealing with the processing of a grievance shall be filed in a separate grievance file and shall not be kept in the personnel file of any of the participants.

4. Forms for filing grievances, serving notices, taking appeals, making reports and recommendations, and other necessary documents shall be prepared jointly by the superintendent and the Association and given appropriate distribution so as to facilitate operation of the grievance procedure.

5. All meetings and hearings under this procedure shall not be conducted in public and shall include only such parties in interest and their designated or selected representatives, heretofore referred to in this ARTICLE.

GRIEVANCE FORM

BYRON HILLS TEACHERS ASSOCIATION

Local No. 15
Case No. 46

Date: May 1, 1973

Name of Employee Byron Hills Teachers Association

Date(s) Case Occurred April 7, 1973

Where Case Occurred Byron Hills High School

Description of Case The position of Teacher-to-Assist-the-Principal, a promotional position, was opened and filled at Byron Hills High School on April 7. 1973 without posting.

Violation of Contract

Article V Section 7A, 1-4

Violation of Practices or Other A similar grievance was filed last year regarding a Teacher-to-Assist-the-Principal position at the Benjamin N. Cardozo School. The Association agreed to withdraw the grievance and settle with the Board on the basis of the enclosed letter from Dr. S., Superintendent of Schools

Solution Desired Recind the appointment of C. Woodrow as Teacher-to-Assist-the-Principal at Byron Hills High School and fill the vacancy as outlined in Article V, Section 7A, 1-4 of the Board Association agreement.

Grievant's Signature Mr. R.

Association Representative's Signature Mr. R.

School Board's Answer. Date of Answer

School Board Representative's Signature

BOARD OF EDUCATION

BYRON HILLS SCHOOLS

September 7, 1972

Mr. R., Staff Representative
Byron Hills Teachers Association
502 Anderson Street
Byron Hills, Massachusetts

Dear Mr. R.:

On August 20, 1972, the Association presented a grievance before the Board's Grievance Committee relative to a situation which developed at the Benjamin N. Cardozo School as of February 19, 1972. The grievance is to the effect that a new position had opened up at the Benjamin N. Cardozo School and no notice was posted to announce such an opening.

The Board's Grievance Committee has reviewed the complaint carefully, It wants to make it clear that prior to this grievance it has not been our policy to post notices for new openings for the job of Teacher-to-Assist-the-Principal because basically it is a teaching job rather than a promotion.

However, the Board's Grievance Committee has requested of the Board and the Board has agreed that for the future when such openings do arise notices of such a vacancy be posted as if this was in fact a true promotion.

We hope that with this change in practice the grievance will be resolved and that we will avoid such types of grievances in the future.

Very truly yours,

Dr. S.
Superintendent
Byron Hills Schools

BYRON HILLS SCHOOLS

MEMORANDUM

TO: Dr. S., Superintendent of Schools

FROM: Mr. R., Staff Representative, Byron Hills Teachers Association

DATE: June 9, 1973

Since the Board has not answered our grievance submitted on May 1, 1973, we are requesting that the issue be brought to arbitration.

DISCUSSION

1. Is the Byron Hills Board of Education obligated, pursuant to Article V, Section 7A, 1-4, to have posted a vacancy in Byron Hills High School for Teacher-to-Assist-the-Principal? If so, what would you suggest the remedy be for this situation?

   Examine the contract (VIII A)
   (VIII E)

2. Is the letter dated September 7, 1972 from Dr. S., Superintendent of Schools, to Mr. R., Staff Representative of the Byron Hills Teachers Association, sufficient evidence to prove their case? If not, what kinds of evidence and/or witnesses should they provide?

   Preparing oral and documentary evidence
   VIII B, C

3. Was the action taken by the Association in submitting the case to arbitration before hearing from the Board on this matter correct?

   Examine the arbitration and grievance processing clauses
   VIII A, V C

4. Assuming you are the Board representative, what forms of proof and kinds of witnesses might be needed?

   Preparing the case
   VIII

5. You will notice that the grievance was submitted by the Association Staff Representative and not by an individual teacher. Does the Board have to entertain the grievance?

   Procedure required by grievance processing.

6. Assume you are a School Administrator. Should you go to arbitration or settle in this case?

   Decision to go to arbitration (IV A)

   (a) Would losing create a precedent that would be costly?

   (b) Should you live with a settlement and try to work things out at the next contract negotiations?

Assume you are a Teacher Representative. Should you go to arbitration or settle in this case? (IV A)

(a) Would losing create a precedent that would be costly?

(b) Should you live with a settlement and try to work things out at the next contract negotiations?

BYRON HILLS BOARD OF EDUCATION

and

BYRON HILLS TEACHERS ASSOCIATION

At the hearing the parties jointly agreed to the following issue to be submitted to the arbitrator:

> Did the Byron Hills Board of Education violate the collective bargaining agreement, specifically Article 5, Section 7A, 1 and/or Article 3 Section A, 1 when it failed to post the position of Teacher to Assist the Principal? If so, what shall the remedy be?

The arbitrator found that it was not relevant, that the position in question did not meet, in all respects, the definition of "promotional positions" as defined in Article 5, because the Board had, in fact, violated the contract when it ignored its own announced policy which first appeared in the superintendent's letter of September 7, 1972. There was no question, based upon the facts presented at the hearing, that this letter expressed the policy of the Board rather than a prospective intention. The parties, themselves, negotiated a very broad grievance procedure when they agreed to include claims involving the terms of application in violation of policies and administrative decisions.

As a remedy the arbitrator ordered that the school board rescind the appointment of the incumbent, and post the position of Teacher to Assist the Principal in accordance with its announced policy.

In a similar case, involving a different school board, the arbitrator found for the Board. That collective bargaining agreement, the arbitrator noted, limited the arbitration of grievances to the interpretation and application of the agreement only, and do not extend to policies unilaterally promulgated that were not in conflict with the Agreement.

CLARK SCHOOL DISTRICT BOARD OF EDUCATION

and

CLARK SCHOOL DISTRICT TEACHERS ASSOCIATION

Applicable Contract Provisions:

Article XIV - Long-Term Substitutes

A. Long-term substitutes with three (3) or more years of continuous satisfactory service, at least one year of which must be in their area of state certification, who meet state certification requirements shall be appointed as permanent teachers pursuant to such certification and placed on the appropriate salary step with all the rights privileges, emoluments, and benefits of a permanent, regularly appointed teacher.

Article III - Grievance Procedure

Section 2 - Procedure

Section 5.

A. In the event a grievance shall not have been settled under the above procedures the employee may have the grievance submitted to binding arbitration by giving, within ten (10) school days after the decision of the Board has been given to the employee and the Association ... to the Superintendent and the Board, the employee's written request for binding arbitration...

BOARD OF EDUCATION
CLARK SCHOOL DISTRICT

May 15, 1974.

Dear Ms. Teacher:

We are renewing your appointment as a full-time long term substitute at Clark High School for the 1974-75 school year. Please advise us by June 1, 1974 whether or not you will be accepting this position.

Thank you.

Very truly yours,

P. Principal

GRIEVANCE FORM

From the agreement between:
The Board of Education, Clark School District and the Clark School District Teacher's Association, No. 221

Date of Filing May 19, 1974

1. Grievant S. Teacher
2. Position Full-time long term substitute, Clark High School
3. Contract provision alleged violated:

   Article XIV, Section A

4. Time, Date, Place of Occurrence:

   May 15, 1974, Clark High School

5. Statement of the grievance:

   As of September 1974, I should have received a regular appointment rather than a fourth year of employment as a long term substitute since I was employed furing the 1971-72, 1972-73 and 1973-74 school years as a long term substitute.

6. Redress Sought:

   Receive a regular appointment for the 1974-75 school year.

S. Teacher
Signature of Grievant

GRIEVANCE FORM RESPONSE

1. Date issued May 26, 1974

2. Response:

During the 1971-72 and 1972-73 school years you were employed 3/4 time. Only during the 1973-74 school year were you employed as a full-time long term substitute. Under Article XIV, Section A, the three years of continuous service called for to be appointed as a permanent teacher should be at full-time employment.

P. Principal
Signature of Principal

3. Initial Applicable Statements:

_____ I hereby accept the above determination.

S. T. I hereby decline the above determination.

S. T. I intend to process the grievance to the next sta

S. Teacher
Signature of Grievant

May 27, 1974
Date

CLARK SCHOOL DISTRICT

TEACHERS ASSOCIATION

May 28, 1974.

Dear Mr. Principal:

The Clark School District Teachers Association supports Ms. S. Teacher's grievance of May 19, 1974 to be appointed as a permanent teacher under Article XIV, Section A of the Board-Association Agreement. It is clearly stated that long term substitutes with three or more years of continuous satisfactory service will be appointed as permanent teachers. There is no stipulation that the employment must be on a full-time basis. We feel that your interpretation of the contract language is arbitrary and unjust.

In view of the aforementioned information, the Association requests that Ms. S. Teacher be given an appointment as a permanent teacher, beginning the 1974-75 school year.

Respectfully submitted,

R. Staff
Staff Representative
Clark School District
Teachers Association

cc: Mr. B. Member, Board Member
Dr. S., Superintendent, Clark School District

BOARD OF EDUCATION

CLARK SCHOOL DISTRICT

June 4, 1975.

Dear Mr. Staff:

Relative to our grievance meeting, the Board reached the following decision on Ms. Teacher's case regarding appointment as a permanent teacher at Clark High School. The Board upholds the opinion of the Principal of Clark High School insofar as it is our understanding that the three years of continuous service called for to be appointed as a permanent teacher refers to full-time employment. The Association nor the grievant has presented a case which would show any violation of the contract existed. Thereby, the Board rules negative and regards the grievance as resolved.

Very truly yours,

B. Member
Boad Member

cc: S. Teacher
P. Principal

CLARK SCHOOL DISTRICT

TEACHERS ASSOCIATION

June 5, 1974.

Dear Mr. Member:

Pursuant to Article III, Section 2, Step 5 of the Grievance Procedure, the Clark School District Teachers Association requests a meeting of the tri-partite arbitration panel to resolve the following grievance:

Name	School	Violation
Teacher, S.	Clark High School	Article XIV, Section A

Very truly yours,

R. Staff
Staff Representative
Clark School District
Teachers Association

cc: S. Teacher
P. Principal
S. Superintendent

DISCUSSION

1. Assuming you are the arbitrator, how would you decide this case? What would you look for in each party's case? If you decide in favor of the Association, what remedy would you propose? If you decide in favor of the Board, is Ms. Teacher's appointment as a long-term substitute in jeopardy for the 1974-75 school year since she did not accept this position by the June 1, 1974 deadline specified?

   Consider -- What evidence necessary
   How long clause in effect
   What experience since then
   Other appointment letters
   What constitutes 3/4 time
   (XII)

2. Do you think the contract language is clear? If not, is the Board justified in its interpretation of the language?

   (XII C)

3. What standards must be met to prove that the Board's decision was arbitrary or unjust?

   (XII A, E)

4. What impact, if any, would this decision have on future grievances of this nature?

   (IV A)

5. Would it be pertinent to know if Ms. Teacher's record as a long-term substitute is satisfactory or not?

   (XII B)

6. Assume you are a School Administrator. Should you go to arbitration or settle in this case?

   (IV A, B)

   a) Would losing create a precedent that would be costly?

b) Should you live with a settlement and try to work things out at the next contract negotiations?

Assume you are a Teacher Representative. Should you go to arbitration or settle in this case?

IV A, B

a) Would losing create a precedent that would be costly?

b) Should you live with a settlement and try to work things out at the next contract negotiations?

CLARK SCHOOL DISTRICT BOARD OF EDUCATION

and

CLARK SCHOOL DISTRICT TEACHERS ASSOCIATION

Despite much discussion and offers of assistance from the arbitrator, the parties could not agree upon a specific issue. Finally, at the arbitrator's suggestion, they agreed to frame the issue in terms of the original grievance:

> What disposition shall be made of the grievance made May 19, 1974 and signed by S. Teacher?

It was not disputed that the grievant was, in fact, a "long term substitute" with three (3) or more years of continuous service. The contract did not speak of full-time long term substitutes and such an interpretation would add to the provisions of the Agreement beyond that to which the parties themselves had agreed to in negotiation. The arbitrator stated, in addition, that it was not a "binding" practice that only full-time, long term substitutes had received permanent status in the past since there was no situation where a long term substitute, not full-time, was up for consideration.

Finally, the arbitrator found that the contract provision was in conformance with the law which likewise made no reference to "full-time". In sustaining the grievance, he directed that S. Teacher receive a regular appointment effective September 1974.

CLEAR VALLEY TEACHERS ASSOCIATION AND

SCHOOL DISTRICT OF CLEAR VALLEY

Applicable Contract Provisions

II Economic Items

J. Proration of Substitutes Salary

It is the procedure of the school board to utilize substitute teachers in the event of absences of classroom teachers and every effort will be made to secure substitutes for such absent teachers. In any situation where a substitute is not available and a classroom teacher is required to utilize any preparation or other period during which he does not have teaching duties, he sahll receive in addition to his regular salary, a pro rata share of the substitute pay for such period. It is understood that in the emergency situation pending the arrival of a substitute teacher, the classroom teachers may volun[illegible]ly assist the building administrator during a period in which he has no teaching duty. In such circumstances the teacher will not be paid for such assistance.

III GENERAL

A. [illegible]ssignment Procedures

4. Each teacher shall have the equivalent of at least five forty minute preparation periods per week. The Union recognizes that minor variations from this principle may be unavoidable at times.

NOTE: This is the first contract between the parties and it became effective on September 1, the month before the grievance was filed.

CLEAR VALLEY SCHOOLS

GRIEVANCE FORM

TO: R., Principal, Clear Valley High School

FROM: T., President of Clear Valley Teachers Association

DATE: October 19

SUBJ: Compensation for lost preparation periods

Dear R.,

I hereby wish to file a grievance under Contract Item II, Economic Items, Page F (J), Proration of Substitute's Salary. We had previously discussed the possible alternatives of compensation for teachers for use of their preparation periods during the testing periods on October 13, 14, and 15. The following alternatives were suggested:

1. Pay teachers for preparation periods.
2. Drop the first and seventh hours during the days of the tests.
3. Excuse the teachers along with the students on Friday at noon, or as soon as the testing program was completed.
4. Furnish substitutes other than seniors.

Neither the first nor the seventh hour was dropped. Teachers were not excused at noon Friday. Substitutes were not made available. It was necessary for certain teachers to use their preparation periods for testing. These were all teachers who have preparation periods second and third hours, Wednesday and Thursday, and all teachers who have preparation periods second and third hours, and fourth hours, on Friday, who were assigned to take part in the testing program. Other teachers in the high school whose regularly scheduled preparation times did not conflict with the testing periods, received such time on the days in question.

Please authorize vouchers to be drawn to cover this matter.

CLEAR VALLEY HIGH SCHOOL

MEMORANDUM

TO: T., President, Teachers Association

FROM: R., Principal

DATE: October 22

SUBJECT: Grievance Letter of October 19

I have received your letter of October 19, requesting compensation for lost preparation periods during the testing periods on October 13, 14 and 15. I cannot see how we have violated any portion of the contract, but I will bring your grievance to the attention of the Board.

CLEAR VALLEY SCHOOLS

MEMORANDUM

TO: R., Principal, Clear Valley High School

FROM: T., President of Clear Valley Teachers Association

DATE: October 25

SUBJECT: Memorandum of October 22

I cannot comprehend how you cannot understand our grievance on lost preparation periods. It is apparent that only the aggrieved were deprived of their scheduled planning period. All other teachers in the same school on the same days enjoyed their scheduled planning periods without interruption. Not only was an inequity thus established, but the cited Contract language is clear and unambiguous in its provision that in ANY situation where a classroom teacher is required to utilize ANY preparation or other periods during which he does not have teaching duties, he shall receive, in addition to his regular salary, a pro-rated share of the substitute pay for such period. The intent of Section III-A-4 was not to provide an "annual average." The obvious purpose of the paragraph, on its face, is to set a minimum weekly number of preparation periods. Since the clear reference is to "at least five 40 minute preparation periods per week," any average could only be a weekly one. If an annual average was to be taken, the paragraph would not have been written as it stands.

CLEAR VALLEY SCHOOLS

BOARD OF EDUCATION

TO: T., President, Teachers Association

FROM: B. Vice-President of the Board

DATE: November 5

Your grievance filed on October 19, has been denied. The Board cannot see where Section II-J has any application to the situation in question, and feels that you simply snatched the second sentence out of context. When the paragraph is read as a whole, it plainly covers only the problem which arises when a regular teacher is absent, and a substitute cannot be procured at all, or arrives late, and a member of the regular staff is then required to utilize his preparation period to teach the class of the absent regular teacher.

With respect to your reliance on Section III-A-4, the Board submits that the basic requirements of this provision have been fully met since all teachers in the system are scheduled for at least five periods each week free from the responsibility of classroom teaching. Furthermore, in the case of the high school, teachers are scheduled for five preparation periods per week, which are much longer than the 40 minute minimum required by the Contract. Not only have the teachers during the first semester had preparation time "equivalent" of five 40 minute periods, but they had a great deal more. In addition, the Board feels that the Union has made no showing, whatever, that a preparation period in the Clear Valley System has been regarded as totally immune from assignment of responsibilities other

than classroom teaching. It declares that the record in the past is to the contrary.

The Board denies that the words, "per week," in Section III-A-4 include an averaging approach for a semester or for the school year. It declares that the words, "equivalent," and "principle," are just as much a part of the section as are the words "per week." It contends that the two sentences of Section III-A-4, read together, simply convey the idea of a basic principle to be maintained over a period of time.

Finally, the Board submits that the teachers involved in the grievance had a much easier and less demanding week than they could expect during a normal week involving full class schedules. Thus, a teacher with a second-hour preparation period lost that preparation period, but was also relieved of the necessity of preparing for and teaching classes which he would otherwise have had during the third hours on Wednesday and Thursday mornings, during the third and fourth hours of Friday morning, and during the Friday afternoon class hours when students were excused and teachers participated in departmental meetings.

DISCUSSION

1. What is the definition of past practice and how does it apply to this grievance?

XII E

2. Would you interpret this contract differently because it is the first between the two parties?

XII C

3. Would you decide this case for the School or the Union? Why?

Evaluating the other party's case
IV

4. If you decided for the Union, what would be your recommendation for computation of the damages?

Decision to arbitrate IV
Estimating costs of the decision

5. Assume you are a School Administrator. Should you go to Arbitration or settle in this case?

IV

a) Would losing create a precedent that would be costly?

b) Should you live with a settlement and try to work things out at the next contract negotiations.

6. Assume you are a Teacher Representative. Should you go to Arbitration or settle in this case?

IV

a) Would losing create a precedent that would be costly?

b) Should you live with a settlement and say to work things out at the next contract negotiations.

CLEAR VALLEY TEACHERS ASSOCIATION

and

THE SCHOOL DISTRICT OF CLEAR VALLEY

THE ISSUE

Did the School Board violate Article II, J and/or Article III, A, 4, when by its refusal to compensate named teachers for use of their preparation periods during the testing periods of October 13, 14 and 15? If so, what shall the remedy be?

This was the first Collective Bargaining Agreement between the parties and the arbitrator found no past practice to clarify the ambiguous contract language being contested by the parties. He did agree, however, that the situation giving rise to the grievance was not one contemplated by Article II, J, "Proration of Substitute Salary". In accepting the School Board's argument the arbitrator held that Article II, J, applied to situations where a classroom teacher was required to utilize a preparation or free period during the absence of a regular classroom teacher where a substitute could not be obtained.

In this case the loss of preparation periods resulted from a testing process which extended over three days. During that time the teachers named in the grievance were required to monitor aptitude tests, but no teacher lost more than two preparation periods that particular week. In addition, the instructional load of those teachers was similarly lessened, although not eliminated. In short the arbitrator was persuaded that these teachers were adversely affected in a minimal way. This was, in his opinion, the type of "minor variation" referred to in Article III, A (4). The grievance was, therefore, denied.

HILL HEIGHTS SCHOOL DISTRICT AND HILL HEIGHTS TEACHERS ASSOCIATION

Applicable Contract Provisions

Article XV Emergency Days and Personal Business Days

Emergency days and personal business days shall be available to teachers under the following conditions:

1. A. All employees shall be eligible for up to three (3) emergency days or personal business days in each school year, beginning with the first year of service, without loss of pay.

B. Personal business days are provided to handle business which cannot be conducted at any other time except on a school day.

D. Requests for use of personal business days to conduct personal business must be submitted at least three (3) days in advance to the Director of Personnel. Such requests must indicate the general category reason and must have the prior approval of the Director of Personnel.

E. Emergency days and personal business days shall accumulate to a total of not more than six (6) days. The maximum accumulation of a teacher at the time a request is made may be used consecutively with prior approval.

G. Approval for the use of personal business will be granted for such as:

1) Legal Business
a) Closing of home purchase
b) Settlement of a will
c) Appearance in court
d) Other legal matters which cannot be accomplished on Saturdays

H. Examples of non-acceptable reasons for use of personal business days are: 5) Interviews for possible future employment

Facts:

Ms. T. was a teacher for Hill Heights School District during both the 1973-74 and 1974-75 school years. On Wednesday, March 13, 1974, Ms. T. secured a personal absence request form from the secretary of Mr. V., the Vice Principal. Ms. T. explained that she desired five consecutive days of leave for personal business beginning on Monday, March 18 and extending through Friday, the 22nd. She intended to travel to Center City, which was over 1000 miles away, in search of living quarters in anticipation of her husband's impending transfer to the Center City area.

When Mr. V. learned of this request, prior to conferring with Ms. T. he communicated with Mr. P., Assistant to the Superintendent, - Personnel Matters. Mr. P. agreed that the request should not be granted because it did not meet the requirements for personal business days as set forth in the Labor Agreement.

Later that day, Mr. V. communicated to Ms. T. the details of the District's decision. Ms. T. had six days of personal leave accumulated and unused at the time. Mr. V. indicated he had no objection to Ms. T's appealing the matter to his superiors, but he would indicate that he had disapproved of the request. Ms. T. discussed the matter with Mr. P on the telephone, who said the request could not be granted because in the past teachers had not been allowed to take personal leave to engage in house hunting.

On Sunday, March 17, 1975, Ms.T. Flew to Center City and remained there for the entire week. Upon her return to her teaching duties on March 25th, she filed the following grievance addressed to Dr. S., the Superintendent of Schools:

"I would like to appeal to the Superintendent to use my personal days.

I requested personal days for personal business which could not be conducted at any other time (out of state) and was refused. I would like to appeal to the Superintendent according to Step #3 of the grievance procedure."

Five days pay was deducted from Ms. T's salary. In an early April discussion with the Superintendent, to whom the case was referred, Ms. T. candidly admitted she had been house hunting in Center City and that while she was there she had filed job applications, (though had no interviews), at several school districts located in the Center City area.

On April 18th, the Superintendent denied her appeal on the basis that her activities on the five days in question could not be considered legal business. Ms. T. then sought relief from the school board, and Dr. S., the Superintendent, proposed a compromise of granting one day of administrative leave. The School Board approved Dr. S.'s recommendation at a special meeting on June 3, 1975.

Ms. T. was then informed by the Superintendent in a letter dated June 5th that:

> "Hill Heights School Board has approved the following resolution: That approval be given for Ms. T. to use one personal day for conducting legal business leading to the purchase of a home in her relocation to Center City. The Board's willingness to approve one personal day is an indication of their understanding of her situation. Hopefully the issue is closed."

When the District persisted in its refusal to reimburse Ms. T. for the other four days pay, she requested that the dispute be referred to arbitration.

Contentions of the Parties

The Hill Heights Teachers Association contends that the District has violated Article XV, G, 1) d) by its refusal to grant Ms. T. the four personal leave days in controversy. The Association argues that the search for a home in an area over 1000 miles away required transportation, sundry matters in connection with real estate investigation, viewing of the premises, discussion of prices, and final execution of contracts, all of which must be considered as legal business. It requests that Ms. T. be reimbursed for the lost salary sustained by the Districts refusal to grant the leave days requested.

The School District denies any Contract violation, and argues that it's refusal to grant five consecutive days under the factual circumstances here was in full compliance with the agreement. The District contends the one day leave granted was enough for transaction of any legal business connected with the purchase of a house. In addition, the District argues such business can usually be arranged to be done on a Saturday and that much paperwork can be done through the mail. It requests that the grievance be denied.

Discussion

1. Assuming you are the arbitrator, how would you decide this grievance? What would you look for in each party's case?

XII C

2. Note the limitations on administrative leave in the contract. Since Section 1) d) is not precise, how does this affect your decision? Does past practice apply to this case? If so, how?

3. What would be the rationale for your arbitration decision?

4. What procedural problems might be involved in this arbitration hearing? What kinds of witnesses and forms of proof might be needed?

X, XI

5. Assume you are a School Administrator. Should you go to arbitration or settle in this case?

   a) Would losing create a precedent that would be costly?

   b) Should you live with a settlement and try to work things out at the next contract negotiations?

Assume you are a Teacher Representative. Should you go to arbitration or settle in this case? IV

   a) Would losing create a precedent that would be costly?

   b) Should you live with a settlement and try to work things out at the next contract negotiations?

HILL HEIGHTS SCHOOL DISTRICT

and

HILL HEIGHTS TEACHERS ASSOCIATION

The question may arise that this case involves discipline since the Grievant took leave even though her request for personal business days had been denied. Since there is nothing in the record which indicates that the School District imposed discipline in any form, the issue is one of contract interpretation and application.

THE ISSUE

Did the Hill Height School District violate Article XV, G, 1 (d) of the Collective Bargaining Agreement by not granting Mrs. T four (4) personal days? If so, what shall the remedy be?

Mrs. T sought personal leave for the stated purpose of searching for "living quarters" in a community 1,000 miles from Hill Heights. After the fact, she revealed that in addition to looking for a home she engaged in a job search. This latter purpose, according to the arbitrator, did not constitute "personal business" as those words appear in Article XV.

Subsection G, 1 of Article XV enumerates legal purposes for which personal leave will be granted (emphasis added). The arbitrator noted that this included "closing of home purchase" but that a distinction existed between looking for a place to live and those attendant legal matters involved in the transfer of real property from one party to another.

Therefore, the arbitrator concluded that the Board had no contractual obligation to grant personal business days for the purpose initially stated by the Grievant. That the Grievant became involved in completing employment applications, a purpose most similar to what the Contract refers to as being "nonacceptable reason", gave further support to the School Board's decision.

STAR CITY TEACHERS ASSOCIATION AND SCHOOL DISTRICT OF STAR CITY

COLLECTIVE BARGAINING AGREEMENT

EFFECTIVE JULY 1, 1970

(Article III provides for the arbitration of unresolved grievances.)

Article IV Board Rights reads in part:

A. The Board reserves to itself sole jurisdiction and authority over matters of policy and retains the right, subject only to the limitations imposed by the language of this agreement, in accordance with applicable laws and regulations:

2. To hire, promote, transfer, assign, and retain employees in positions in the school district, and for just cause, to suspend, to demote, discharge, or take other disciplinary action against employees....

Article XIV reads in part:

B. In the determination of requests for voluntary reassignments and/or transfer, the wishes of the individual teacher shall be honored to the extent that the transfer does not conflict with the instructional requirements and best interests of the school system.

STAR CITY SCHOOLS

MEMORANDUM

TO: Tim Moe, Teacher

DATE: May 26, 1970

FROM: F. Jones, School Superintendent

SUBJECT: Transfer

I have received your note of May 18, 1970 requesting transfer to a Social Studies position within our school district. I will bring appropriate openings to your attention.

STAR CITY SCHOOLS

MEMORANDUM

TO: F. Jones, Superintendent

FROM: Time Moe, Teacher

DATE: July 10, 1970

SUBJECT: Interview of June 19, 1970

Dear Sir:

In our interview of June 19, 1970 in your office, you stated, among other things, that as a teacher I "needed more seasoning" and needed to plan more for discipline. I have taught in Star City Schools for two years now and I have never received any adverse written reports in my personnel file. In addition, this winter I received a written commendation from the Assistant Superintendent, K. Lane, for a play program I conducted at Main Avenue School. I am enclosing a photocopy of this commendation plus an observation report by my principal, P. White, which was made on Sept. 18, 1968, a bare 17 days after I began teaching. I feel you have been hasty in your judgments of my teaching.

Sincerely,

T. Moe

STAR CITY SCHOOLS

OBSERVATION REPORT

CLASS: Grade 6, Main Avenue School

TEACHER: Tim Moe

DATE: September 18, 1968

The class was under control and this is difficult with a slow class and a new teacher. The teacher may wish to ask the children to raise their hands before contributing to class discussion. The arrangement of chairs and desks in the classroom was a novel one and seemed to facilitate good interaction between children.

P. White, Principal

SPRINGFIELD STATE UNIVERSITY

TRANSCRIPT OF RECORD - COLLEGE OF ARTS AND SCIENCES

Moe, Timothy Walter # 155-41-0890

111 Donaldson Ave., Orangetown Born: November 14, 1946

Orangetown High School Graduated: June 21, 1964

Admitted to the College of Arts and Sciences Sept. 2, 1964

Bachelor of Arts in History with provisional Social Studies teaching certificate May 29, 1968

Number	Title	Credit Hours	Grade
History 110	Studies in American History	3	A-
History 111	Studies in American History	3	A
English 181	English Comp.	3	B+
Speech 121	Intro to Public Speaking	3	B
Math 101	Coll Calculus I	3	C+
Math 102	Coll Calculus II	3	B
Biol 103	Intro to Biology	3	C
Biol 104	Intro to Biology	3	B-
Geog 133	Cultural Geography	4	B+
Polsci 131	International Rel. I	3	A
History 211	20th Century China	4	B+
History 225	Mod East Europe	4	B
Education 300	Education Thought	6	B+
Health 150	Health Prob	3	B+
History 265	Latin America	4	A
History 275	Frontier American	4	A-
Art 122	Intro to Drawing	4	B
History 219	19th Century Europe	4	A-
History 250	Britain to 1688	4	A
History 281	American Social Problem	4	B+
History 490	Student Teaching	8	A
Education 400	Teacher in Comm	3	A
History 390	Methods of Teaching	4	A
Socio 240	Pol. Sociology	4	B
Music 191	Music Apprec. 1	4	C+
Geol. 202	North Am. Geol	4	B
Psyc 240	Child Psych	6	B+
Polsci 200	Amer. Govt.	8	A-
Geog 293	Geomorphology	4	B-
Educ. 304	Obser & Partic	5	A-

SPRINGFIELD STATE UNIVERSITY

TRANSCRIPT OF RECORD - THE GRADUATE SCHOOL

Moe, Timothy Walter #155-41-0898

111 Donaldson St., Orangetown Born: November 14, 1946.

Admitted to the Graduate School, Sept. 1968

(B.A. Springfield, 1968)

Number	Title	Credit Hours	Grade
History 520	Prob. Am. Hist.	4	A-
Education 483	Child Motiv	4	A-
Education 501	School Adm.	3	A
Education 495	Teaching Reading	3	B+

STAR CITY SCHOOLS

GRIEVANCE FORM

TO: P. White, Principal

FROM: T. Moe, Teacher

DATE: July 22, 1970

I hereby wish to file a grievance under Articles XIV of our collective bargaining agreement. I have repeatedly requested transfer to a Social Studies position for which I am qualified. There is no reason for the School Board not to have transferred me before hiring new teachers to fill such positions. Despite promises from the School District Administration, I was not apprised of one and possibly two open positions teaching seventh grade Social Studies at Carleton School. Such transfers would not only benefit me personally by putting me in a position for which I am better qualified than the one I now hold, but it would enable the school district to better utilize available teaching personnel.

STAR CITY SCHOOLS

REPLY TO GRIEVANCE

NAME OF EMPLOYEE: T. Moe

FROM: P. White, Principal

DATE: July 28, 1970

I reject your grievance of July 22 on the following grounds:

1) It has been the policy for only tenured teachers to ask for transfers.

2) As president of the Star City Teachers Association, you have time demands conflicting with the time needed for a new position.

3) You should not have the same students again in 1970-71 that you taught in 1969-70. They were too difficult for you to control and teach.

4) Another year's experience will certainly be an added advantage to get you ready to move to a higher grade.

You may, of course, appeal this decision to a higher level.

P. White

STAR CITY SCHOOLS

MEMORANDUM

TO: P. White, Principal FROM: Tim Moe, Teacher

DATE: August 3, 1970

SUBJECT: Grievance

In regard to your reply of July 28 to my grievance of July 22, I wish to point out that your emphasis on tenure is misplaced and that I have long carried multiple responsibilities so I can handle the work and my Teachers Association Presidency at the same time. More importantly, I doubt I will get the same troubling students again in 1970-71 and my observations indicate no difficulties whatsoever with discipline.

In the position I have requested, I could get a permanent certificate with expedition and this would be of value to the district. It would relieve me of the necessity for continuing to take courses for permanent certification in elementary education, an area in which I do not intend to continue and which fails to see my abilities fully. Nor do I feel that I need further experience. Besides you have been hiring first year teachers for similar positions in the school in which I wish to teach.

STAR CITY SCHOOLS

BOARD OF EDUCATION

To: Tim Moe Date: August 26, 1970

Your grievance originally filed on July 22, 1970, has been denied. In addition, we are sorry you are disappointed in not being transferred to the seventh grade Social Studies position at Carleton School. However, the members of the Board feel that there is a real need to strengthen school discipline in Carleton School and for this reason has selected the strongest disciplinarian available to add to the staff.

The Board has considered your qualifications and your application for this position and will continue to consider you for future vacancies, but in this particular instance, we feel it's advisable to accept the recommendation of the school administrator.

John Harner

Vice-President of the Board

DISCUSSION

The enclosed file is presented to you, the arbitrator.

1. How would you handle it? Would you uphold the School Board's decision or would you reverse it and why?

2. What do you think about the answers given to the grievant at the various stages of the grievance procedure?

3. What are the strongest points in favor of the Teacher's Association? The School District?

4. Was the School District's decision arbitrary or capricious? Why or why not?

5. Assume you are a School Administrator. Should you go to Arbitration or settle in this case?

    a) Would losing create a precedent that would be costly?

    b) Should you live with a settlement and try to work things out at the next contract negotiations.

Assume you are a Teacher Representative. Should you go to Arbitration or settle in this case?

a) Would losing create a precedent that would be costly?

b) Should you live with a settlement and try to work things out at the next contract negotiations?

STAR CITY TEACHERS ASSOCIATION

and

SCHOOL DISTRICT OF STAR CITY

The arbitrator found that the School Board had not violated the Collective Bargaining Agreement when it denied Tim Moe's request for a voluntary transfer. Acknowledging that the statements of the Principal, P. J. White, did not enhance the Board's position, the arbitrator, nonetheless, held that they were not controlling of the issue. No claim was made by the Association that the Grievant was being discriminated against because of Association activities. Furthermore, the arbitrator stated that the School Board's policy of limiting voluntary transfers to tenured teachers conflicted with the Contract where the word "teacher" appears unmodified.

The arbitrator was persuaded by the evidence presented at the hearing that Moe was experiencing some disciplinary problems with his students. He went on to say that Paragraph 2, (b) of Article V gave to the Board broad discretion and that, in his opinion, it applied its discretion in a reasonable manner. The arbitrator refused to substitute his judgment for that of the Board because the Board had not abused its authority by acting in a capricious or arbitrary fashion.

Rutgers University, The State University of New Jersey
Institute of Management and Labor Relations

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